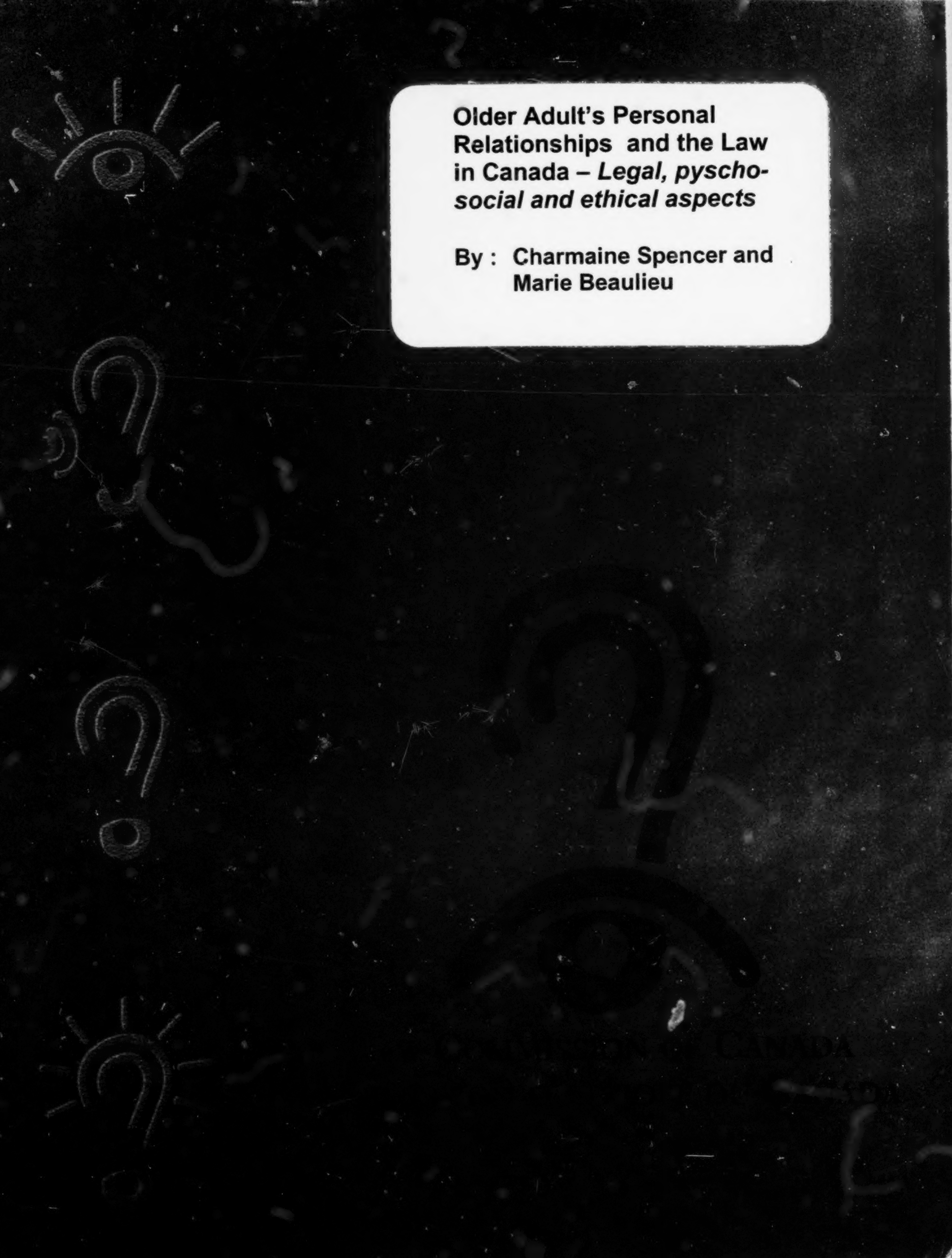

# Older Adult's Personal Relationships and the Law in Canada – *Legal, pyscho-social and ethical aspects*

By : Charmaine Spencer and
Marie Beaulieu

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This paper was prepared for the Law Commission of Canada. The views expressed are those of the authors and do not necessarily reflect the views of the Commission. The accuracy of the information contained in the paper is the sole responsibility of the authors.

Ce document est également disponible en français sous le titre *Le droit et les relations personnelles des personnes aînées au Canada – Aspects légaux, psychosociaux et auxiologiques*.

# Older Adults' Personal Relationships and the Law in Canada

## Legal, psycho-social and ethical aspects

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# Summary

This report provides an analysis and critical reflection of the relationships between Canadian law and older adults' personal relationships. It begins with a portrait of older adults and ageing in Canada. Chapters II and III present a definition of the concept central to the study, namely, older adults' personal relationships, comparing and contrasting the social science literature and the legal literature. Chapter IV establishes Canada's pluralist ethical context by offering reflections on the main social values in Canada. This chapter is based primarily on a comparison of the values emerging in the *Canadian Charter of Rights and Freedoms*, provincial charters and human rights legislation, with the social reality of older adults. Chapter V presents the results of a survey we did of eleven specialists on legal issues and the law (some are legal scholars and others work with older adults). As a result of this consultation, it was possible to propose a diagnosis of the state of the law with regard to the personal relationships of older adults. Chapter VI contains an analysis of seven areas of law that directly or indirectly cover issues related to older adults' personal relationships. Special attention is paid to the presuppositions about older adults entrenched in legislative provisions and practices. Chapter VII presents a detailed analysis of the issues raised by three cases involving older adults which were brought before the Canadian courts. The last chapter contains a summary of the study, highlights the main strengths and weaknesses of Canadian law with respect to older adults' personal relationships, and presents a series of recommendations aimed at shaping change.

# Biographical Notes

***Marie Beaulieu***, Ph.D. (Applied Human Sciences) and M.Sc and B.Sc. (Criminology), is a professor and a researcher at the Université du Québec à Rimouski. She is the Director of the Masters in Ethics Program. She teaches in the Psychosociology Programs and at the Masters level in Ethics. In 98-99, she spent the major part of her sabbatical as a Visiting Professor at the Gerontology Research Centre at Simon Fraser University.

Ms. Beaulieu has been the principal investigator or co-investigator in more than 16 major research projects (funded by federal, provincial or other agencies). Her works include more than ninety communications and seventy publications (scientific articles, book chapters, research reports, etc.). Ms. Beaulieu's work centres on older adult abuse issues in the community and institutional settings, violence and psychosocial practices. Her Ph.D. thesis was on older adult abuse in institutional settings.

Specializing in applied and qualitative research, she has conducted studies using a number of different types of content analysis, bibliographical method, case studies, in-deep interviews, grounded theory methodology, critical review, participative inquiry and computer analysis tools. She also trains managers, practitioners and older adults in Québec and France, on different issues related to older adult abuse and ethical dilemmas.

In recent years, at the Université du Québec in Rimouski, she has been the Director of the Psychosocial Unit, Responsible for the Certificate for Older Adults (older adult learning), titled "Psychosocial changes for the elderly and the communities", Vice-President of ETHOS (institutional Research Group on Ethics).

Previously, she was Vice-President of the Québec Association of Gerontology, as well as a member of several advisory committees related to older adults and violence r Health Canada and the 1 Sciences and Humanities Research Counsel, etc. Ms. Beaulieu participates in activities of the Association Québécoise de Gérontologie, the Canadian Association of Gerontology, the Association Internationale Francophone de Gérontologie, the International Association of Gerontology, etc.

***Charmaine Spencer***, LL.M., Research Associate in Vulnerable Populations (Gerontology Research Centre, Simon Fraser University) is a lawyer whose research focuses on a range of "risk" and older adult abuse issues in community and institutional settings. Ms. Spencer has been a member of the Centre's staff since 1991. She has a Bachelor's Degree in Psychology and two law degrees. Her master's thesis focussed on the potential of Canadian tort law in the protection of human rights. She is a member of the Law Society of British Columbia. Her legal interests have focussed on disability law, human rights protection, guardianship and labour law issues. She has written on a number of the legal aspects of family relationships with older adults, most recently in light of cases such as *Newson* v. *Newson*.

At the Gerontology Research Centre, Spencer's research has focussed on 1) abuse of older adults ("elder abuse")—particularly, financial abuse and legal issues in abuse; 2) competency and risk among seniors; 3) ethical and legal issues in ageing; and 4) guardianship. In 1992, she began a two and one-half year study funded by the Notary Foundation of B.C. looking at financial abuse of seniors in B.C., the first study of its kind in Canada. In 1994 she wrote a Discussion Paper for the federal government on abuse and neglect of older adults in institutional settings.

In 1995, she prepared a conceptual framework for the federal government and the Canadian Association on Gerontology to aid governments' and the public's understanding of the meaning of the term at "risk" as it relates to seniors. She has been developing a practical decision-making model to help service providers deal with ethical dilemmas they may face in helping seniors who have been abused or exploited. Recently, she has been developing a conceptual framework and blueprint for Health Canada, examining the economic and social costs of abuse against older adults.

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# Acknowledgments

In 1998, the Law Commission of Canada embarked on an initiative to examine how the law deals with interpersonal relationships between generations, within the evolving family, and in cases where an imbalance of power leads to injustice and exploitation. That initiative lead to the development of three reports on older adults' personal relationships, of which this is one.

We wish to thank the Law Commission of Canada for giving us the opportunity to explore this issue. We also wish to thank Judith Wahl, our friend and colleague who encouraged us at the outset of the project, and helped us identify the eleven key people we surveyed as part of producing this report.

A special thanks goes to those eleven individuals for giving us the benefit of their time, their experience and their insights on how Canadian laws affect older adults and their relationships. They are:

1. Jocelyn Downie, Director Health Law Institute, Dalhousie University (Halifax, Nova Scotia);
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6. Pearl Mckenzie, Community Educator, (Black Creek, British Columbia);
7. Donald Poirier, Professor, University of Moncton Law School (Moncton, New Brunswick);
8. Gerald Robertson, Professor, Medical and Mental Health Law, University Of Alberta Law School (Edmonton, Alberta);

9. Margaret Somerville, Director, Centre for Medicine, Ethics and Law, McGill University (Montreal, Quebec);

10. Rolli Thompson, Professor, Family Law, Dalhousie University (Halifax, Nova Scotia);

11. Valerie White, Co-ordinator, Senior Citizens' Secretariat (Halifax, Nova Scotia).

We also wish to acknowledge the significant contribution of our own families, particularly our own parents, as well as the many seniors we have come to known over the years. They have inspired us to think about what it means to grow older and to foster relationships throughout life.

*It is the meaning that men attribute to their life, it is their entire system of values that define the meaning and value of old age. The reverse applies: by the way in which a society behaves toward its old people, it uncovers the naked, and often carefully hidden, truth about its real principles and aims.*

~ Simone de Beauvoir ~

# Introduction

Changing society, changing values, increased life expectancy, decreased number of births, early retirement etc., are all characteristics of Canadian society entering the third millennium. World history has always been comprised of changes, but the phases that we are currently moving through are without historical precedent. In light of these many changes, it is normal that we are questioning our social policies, reorienting services to meet the changing needs of citizens better, and enumerating the responsibilities of government vis à vis citizens of all ages.

During the last century, the percentage of adults in Canada aged 65 and over has dramatically changed from less than 5% at the beginning of the century to almost 14% at the end of the century.[1] In a growing number of Canadian communities, seniors now represent one quarter of the adult population. Within the next 50 years, the expected increase will be even more dramatic. Statistics Canada has projected, for example, that by 2021 there will be almost seven million seniors in Canada. They will represent 18% of the total population. By 2041, there will be almost 10 million seniors, who will make up an estimated 23% of the population. This trend is not limited to Canada. The whole world is experiencing population ageing, and other countries are further along the path of population ageing than Canada is.

In the last half of this century, we have seen the recognition of a "third age" of life. Life after retirement represents new beginnings and new opportunities. Here, older adults change some earlier roles, but continue the process of maturing, contributing to society in new ways. Many older adults now experience the possibility of a "fourth age", where living into one's 80s and 90s is becoming a growing reality. Many of today's older adults have the reasonable expectation of living much of their later life in good health, albeit with mild physical disabilities. Even when illness or a major health condition strikes, most seniors are able to recover fairly well.

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[1] National Advisory Council on Aging. *Aging Vignettes #1* "A Quick Portrait of Canadian Seniors, How Many Seniors? Women Versus Men? How Old?" (1997) Online: <http://www.hc-sc.gc.ca/seniors-aines/seniors/english/map.htm>
Also available in print form from National Advisory Council on Aging.

Changes in longevity, improved health, and different needs among older adults have an increasingly important social and legal impact. At a societal level, we are seeing many shifts in expectations in what "growing older" means, as well as a new understanding of what older adults can expect of themselves, from family and friends, and from society and governments.

Law as the reservoir of social values and social regulation will likely affect older people's lives in one way or another. The law will affect more and more older people, in large part because of changing demographics. Therefore, the role and potential impact of the law in older adults' relationships will likely become increasingly important in the next decades. The underlying question is: what can we learn from today's issues in order to reshape law for tomorrow?

This current reality and the quickly changing future offers wonderful opportunities to think about law, not only the "letter of the law", but also the way law emerges and takes form, and the way it is interpreted and applied as embodying a broader reflection on dominant social values. This report offers an opportunity to begin understanding the diversity and complexity of older adults' relationships and the ways in which the law is or can be involved in those relationships. Older adults are people's spouses, siblings, friends, neighbours, former workmates, etc. Each of these roles can be the foundation for a personal relationship. They often have personal relationships with their grown children, grandchildren, people they treat as "kin" ("fictive kin"), friends, and many others.

The focus of this report is on older adults' *personal* relationships. Throughout it, we describe different ways of looking at these personal relationships as well as different types of personal relationships that older adults experience. One of the challenges from the outset is determining what is a personal relationship, and how does it differ from other types of relationships.

We begin here simply by framing a personal relationship through contrast (that is, determining what it is *not*). A personal relationship is not a professional relationship where the relationship revolves around the older adult *receiving a service* (e.g. receiving medical care or receiving financial advice), relying on *specialized knowledge* on the part of other party and or on *time limited or circumscribed involvement*. Nor is it a social relationship (one that develops by membership to a group, such as a dance club). It is not an economic relationship, although many personal relationships have an economic or financial dimension to them. Personal relationships sometimes develop from each of those other types of relationships.

Personal relationships exist within a social context, where third parties have some degree of influence on the relationship. "No relationship can be considered independently from the social, cultural, and temporal situation in which it is embedded. Relationships both affect and are affected by the socio-cultural structure."[2] They reflect the system of values, norms, stereotypes, myths, and institutions of the group, as well as the society.[3]

The typical discussion of personal relationships cuts through a broad range of disciplines, including psychology, psychiatry, communication studies, sociology, anthropology, and family studies. The law, typically, has not been considered as influencing the discourse. However, the law can be intimately involved in shaping, and reordering an older adult's personal relationships. In the context of the law, older adults' personal relationships tend to be scrutinized by outsiders to the relationship (others in the family, service providers), who judge not only whether there is a relationship, but its nature and quality. By considering not only the law but also its application, this report considers whether older adults' personal relationships are scrutinized differently than those of other age groups.

## A. The Goals and Objectives of this Report

The four goals of this report are to:

1. Explore the values and assumptions that underlie the law and legal approaches to personal relationships involving older adults, looking at where the law is involved, and where the law has not been involved;
2. Articulate the social values that underlie why and how the law governs certain classes of personal relationships involving older adults;
3. Examine the ways in which these personal relationships currently shape official law; and
4. Examine the ways in which personal relationships may shape the law in the future.

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[2] R.A. Hinde, "A suggested structure for a science of relationships" (Mar. 1995) 2(1) Personal Relationships 1-15.

[3] *Ibid.*

To accomplish this, we have used a four step approach of consultation, bibliographical study, in-depth analysis and case study. (See Appendix A for methodology). The information provided from these diverse sources helps us to answer four key questions:

1. What are the major problems with regard to law and older adults' relationships?
2. What has been said on older adults' relationships and the law?
3. What are the values that can be extracted from social and legal material related to older adults' relationships?
4. What can we learn from the social and legal practices regarding law and older adults' relationships?

This approach has certain similarities to "grounded theory" used in qualitative research (where a conceptual framework evolves during the research, where ideas are generated from the data, etc.). Our approach is more suited to examining legal, psychosocial and value issues concurrently. Also, our conceptual work does not emphasize theory development. However, it will propose ways of questioning the laws and their application in the field of older adults' relationships.

## B. Organization of the Report

In this report we discuss the law and older adults' personal relationships from several angles. Chapter I sets the context for our examination of older adults' personal relationships in law by presenting background information on ageing in Canada. The second chapter defines the central concept: "older adults' personal relationships", based on social science literature and legal literature. It compares and contrasts the different ideas and foci within the two fields. Chapter III focuses on the legal literature, examining the development of elder law and how the law currently perceives older adults.

Chapter IV discusses commonly identified social values in Canadian society, drawing from the *Canadian Charter of Rights and Freedoms* and provincial charters of rights and human rights legislation. It compares this "promise for all" to the reality for older adults. In Chapter V we draw from the insights of eleven key individuals who have experience with working with seniors or who work and research in areas of law that relate to older adults. Their insights help identify problem areas of the law and legal practice, and where the law has served older adults well. We have incorporated many of their ideas not only in Chapter five, but throughout the report as well.

Chapter VI briefly describes several areas where the law has been involved in older adults' personal relationships to some extent. One of those areas, adult protection and elder abuse, is covered more fully by Professor Donald Poirier, University of Moncton, in a separate report to the Law Commission. Chapter VII looks at the underlying assumptions in the law in the context of older adults' personal relationships drawing from three illustrative cases (which are described in greater detail in the appendices). Chapter VIII provides a synthesis of the main problems and main issues from the law as it currently is involved with older adults and their personal relationships.

The report also has two main appendices. Appendix A describes the methodology used. Appendix B examines whether older adults are more vulnerable to exploitation or harm in their relationships than younger adults.

Throughout this report, we use the term "older adult" or "senior" interchangeably. We have consciously avoided use of the term "elderly" because it carries with it a strong connotation of frailty, vulnerability, and dependency that does not accurately reflect the reality of the lives of most older adults or of adults throughout most of the later part of their lives. There will be points in many older adults' lives where frailty, vulnerability, and dependency may arise, but it is important to neither exaggerate their existence nor to downplay it.

# CHAPTER I

*Since it is the Other within us who is old, it is natural that the revelation of our age should come to us from outside -- from others.*

~ Simone de Beauvoir ~

# A Portrait of Ageing in Canada

Older adults' personal relationships cannot be viewed in isolation. They exist within a social, political, legal, economic, and cultural context. This "contextualization" involves understanding the social ideas about ageing (particular stereotypes, assumptions, and misconceptions), the normal process of ageing, and the heterogeneity of ageing experiences. Growing older involves change: changing social and economic resources, changing health, and (for some older adults) changing mental capacity. While these changes are often characterized in the ageing literature as "losses", they actually reflect a natural movement in all people's lives as they grow older. People often adapt to these changes according to their values, their upbringing, lifestyle and priorities.

In this chapter, we set the context for examining older adults' personal relationships in the law by providing background information on ageing in Canada, focusing on the changing demography.

## A. Recognizing Diversity

> *The ageing population in Canada has undergone dramatic changes in the last century, and will continue to do so in the next.*

Canada's older adults are not a homogeneous group. Older men and older women often have had very different life experiences, and social expectations of them throughout their lives. There are other important differences among seniors related to their income, their health, and types of communities in which they live. Canadian seniors can vary significantly as to with whom they live, what they consider as important relationships, and why. All the above diversities affect the older adult's life and can shape their social and personal relationships. In addition, economic considerations and personal resources become important parts of the equation as well.

## B. Healthy Ageing

Unlike common stereotypes that equate ageing with disability (and consequently a perceived need for caregiving by others), today's seniors are living longer while living relatively healthier. In 1996, 40% of seniors reported their health as very good or excellent. Only 6% described their health as poor.[4] While 82% of all seniors living at home had a chronic health condition (e.g. high blood pressure, arthritis) only 28% were limited in at least some activities because of their health condition. Approximately 25% of seniors, and 45% of seniors aged 85 and over, have a long-term disability. This creates different realities—ability for many, and disability for some.

Ageing is often linked in the public perception with memory deterioration. Once again, the reality for most seniors is quite different. Memory loss functions on a continuum, from minor or occasional forgetfulness to occasional confusion to longer lasting impairments. At the extreme end is dementia. Most do not experience this: only one in thirteen Canadians over age 65 is affected by Alzheimer's disease and related dementias. The prevalence increases, the older one gets. It affects 2.4% of people aged 65-74 years, and 34.5% of those aged 85 or over.[5]

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[4] Statistics Canada, *National Population Health Survey* (1996).

[5] Canadian Study of Health and Aging Working Group, "Canadian Study of Health and Aging: study methods and prevalence of dementia" (1994) 150(6) Canadian Medical Association Journal 899-913. Online: <http://www.uottawa.ca/academic/med/epid/core1.htm> According to the Canadian Study on Health and Aging Work Group, 1994, one half of seniors who have dementia continue to live in the community, often with the support of their wife (24%) or their daughter (29%). Twenty-nine percent of people with some form of dementia live alone, although typically a daughter lives nearby to give care and support. See: Canadian Study on Health and Aging Work Group, "Patterns of care for people with dementia in Canada" (1994) 13 Canadian Journal on Aging 470-487.

## C. Who Lives to Be Old?

When looking at older adults' personal relationships, it is important to recognize whose relationships we are often talking about. We need to consider who lives to be old. In today's society, older women substantially outnumber older men (2,704,0,000, compared to 1,487,800, respectively in 1996). The gap widens significantly among seniors in their 80s: two-thirds of individuals aged 80 years and over are women.[6] This "gender reality" will become very important when looking at who is affected by any law that touches upon older adults. Laws dealing with any aspect of an older adult's life or relationships will likely have a differential impact on older women, simply because there are more older women.

Gender differences transcend numbers. Those differences may need to be understood by those who apply the law. Older men may have different expectations and experience qualitatively different issues in their relationships than older women do.[7] For example, for many older men, their spouse has been their major (and often only) confidant. When a man becomes widowed, he often loses his only deep and intense relationship. Older women are more likely to have more connections to others in the family and beyond. This difference in ties to others may be part of the reason many more older men remarry within a few years of widowhood, compared to older women.

## D. Relationships in Older Age

Personal relationships can depend on the number of available relationships, the quality of those relationships, and their length. Although there is the opportunity to develop new relationships at any age, older adults may experience a number of special challenges, as a spouse and friends predecease them, or family and friends move away. According to the literature, older adults' relationships relate primarily to family relationships-- those with one's spouse or one's children and grandchildren. Relations with peers are another important category.

### 1. With Spouse

In the 1991 Census, far more older men than older women were married and lived as couples (71.3% and 38.7%, respectively). There has been an increase over the decades in the number of couples in Canada who have been married for 50 or more years, partly because of increased longevity, partly because older adults are less likely than younger adults to divorce. At the same time, we are also seeing far more older couples entering into a second or third marriage. Living together can be positive for many older couples. However, some couples experience relationship difficulties stemming from a history of dysfunction, violence or from major life changes, including meeting the changing needs of one or both of partners.[8]

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[6] Statistics Canada, "Age and sex, 1996 census" *The Daily* (29 July 1997).

[7] J. I. Kosberg & L.W. Kaye eds., *Elderly Men: Special Problems and Professional Challenges* (New York: Springer, 1997).

Widowhood is an extremely common experience in later life, particularly for older women. On average, women live longer than men by six years, and women frequently marry men who are a few years older than themselves. Most older men are married, even into their late senior years. Only 12.7% of all older men experience widowhood (compared to one in three of all older women). At age 65, 31.6% of women are widows. By age 75-84, this increases to 58%. Among people aged 85 and over, almost 80% of women are widowed. Older women can expect to live at least 20-30 years on their own, upon becoming widowed.[9]

Widowhood often means living alone. While only 8% of people age 25-34 live alone, 22% of people aged 65 to 74 lived by themselves in 1996. The proportion increases further, the older one becomes (37% for ages 75 to 84 and 48% for those aged 85 and over).[10] Women aged 65 and over were more than twice as likely to live alone as men. For some older adults, living alone is a preferred way of living, [11] with many other meaningful relationships still available for the person. For others, living alone may reflect a lack of personal relationships and it can set the stage for social isolation.

It is important to distinguish between *being alone* and *loneliness.* It is also important to distinguish between *living alone* and *being alone.* For many older adults, being alone may simply reflect not wanting to reside with one's children or others. It is often a reflection of personal choice, personality, independence and autonomy. Communication and involvement with family and friends is often still there.

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[8] S. Gravel, M. Lithwick & M. Beaulieu, "Quand viellir ensemble fait mal; les mauvais traitements dans les couples aînés" (1997) 30(2) Criminologie 67-85.

[9] Health Canada, Division of Aging and Seniors, *Canada's Seniors, No. 14, Marital Status* by Statistics Canada (1999). Online: <http://www.hc-sc.gc.ca/seniors-aines/pubs/factoids/en/no14.htm>

[10] National Advisory Council on Aging. *Aging Vignettes #4*, "A Quick Portrait of Canadian Seniors, 'How Many Live With Their Family? Alone?'" Based on data from Statistics Canada, 1996 Census. Online: <http://www.hc-sc.gc.ca/seniors-aines/seniors/english/map.htm>

[11] V. Doyle, *It's My Turn Now: The Choice of Older Women to Live Alone* (Vancouver: Gerontology Research Centre, Simon Fraser University, 1994).

## 2. With Family and Friends

Typically when people think of personal relationships, kinship relationships come to mind and in most of the literature, kinship is treated as automatically creating a relationship. Kinship is seen as giving people a sense of belonging. Kinship relationships are also often described in terms of specific types of help that kin can offer (hopefully when needed) such as general assistance, emotional support, and practical advice (e.g. on financial matters). Kinship relationships need to be nurtured by both sides to remain satisfactory, otherwise one or the other party "loses touch" and they unilaterally or mutually withdraw from the relationship.[12]

Today, families are often geographically dispersed and a large proportion of younger women is now in the work force. This often means that families are not necessarily available or able to give care to ageing parents who are in need of assistance. For one in two older adults, their closest offspring lives at least 10 kilometres away. Living nearby does not necessarily mean frequent or meaningful communication, and living at a distance does not mean absence of communication. Families will differ widely in the level of involvement they want with their ageing parents, whether that is giving personal care, helping with banking or shopping, or making decisions on the senior's behalf during incapacity.

On average, there is still significant family contact between ageing parents and their children, which gerontologists have described as "intimacy at a distance". According to Statistics Canada, even though a significant proportion of seniors have contact with some family only once a week or once a month, the vast majority (71%) of them are happy with the current amount of contact. Only less than one in five (18%) would like it to be more. Some (7%) would be happy with less frequent contact.

The proportion of seniors who live with their extended family, such as a son or daughter, has fallen in recent decades, down from 11% in 1981 and 16% in 1971.[13] In 1996, only 7% of all people aged 65 and over lived in an extended family. Improved economic circumstances for today's seniors and for their offspring has made this possible.

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[12] D. Jerome, "Family estrangement: parents and children who 'lose touch'" (1994) 16(3) Journal of Family Therapy 241-58.

[13] Health Canada, Division of Aging and Seniors, "Canada's Seniors, No. 7, Living with Extended Families" by Statistics Canada (1999). Online: <http://www.hc-sc.gc.ca/seniors-aines/pubs/factoids/en/no7.htm>

Friends are another important type of relationship. However, 30% of seniors state that they have only one or two friends still living.[14] At the other end of the continuum, 35% of older adults have ten or more friends. For many seniors, these relationships will have special meaning and value. Some older adults have been single throughout their life, and their relationships with family and friends develop in a different kind of way than those who are or have been married.[15]

### 3. Relationships in Community v. Institution

Most seniors live in the community. The public tends to think of personal relationships in that context, and this report focuses mainly on relationships in community. However, it is important to remember that at any given point in time, approximately 7% of older adults live in institutional settings (e.g. nursing homes, homes for the aged).[16] It is important to realize that a far greater percentage of seniors will live in an institutional setting *at some point in their lives*. At least 20-30% of all seniors will spend their last years in a care facility.[17] In 1996, 38% of all women aged 85 and over lived in an institution, compared with 24% of their male counterparts.[18]

In institutional settings, older adults' opportunities for personal relationships may be very different from older adults in the community, and the dynamics of those relationships will also differ. This is partly because of the setting, partly because of the adult's relative level of health and dependency. Institutional placement often means a drop in interactions with old friends and relatives.[19] While institutions offer the *potential* for new relationships, research indicates that potential is often illusory.[20]

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[14] Statistics Canada, *Family and Friends*, Cat. No 11-612 (Ottawa: Statistics Canada, 1994) 114. [Based on the 1990 General Social Survey].

[15] L. Strain & B. Payne, "Social networks and patterns of social interaction among ever single and separated/divorced elderly Canadians" (Spring, 1992) 11(1/2) Canadian Journal on Aging 31-53.

[16] According to 1996 Statistics Canada and National Population Health Survey figures, the rate varies across Canada, from a low of 5.6% in B.C. to 9.8% in Quebec.

[17] C.M. Murtaugh, P.M. Kemper & B. Spillman, "The risk of nursing home use in later life" (Oct. 1990) 28(10) Medical Care 952-962.

[18] Health Canada, Division of Aging and Seniors, *Canada's Seniors, No. 12, Living in Institutions* by Statistics Canada (1999). Online: <http://www.hc-sc.gc.ca/seniors-aines/pubs/factoids/en/no12.htm>

[19] E. Kahana, B. Hahana & R. Young, "Social factors in institutional living" in W.A. Peterson & J. Quadagno, eds., *Social Bonds in Later Life* (Newbury Park: Sage, 1985) 389-418.

[20] Association of Advocates for Care Reform, *Social Isolation of Seniors in Care Facilities* (Vancouver, B.C.: Peanut Butter Publishing, 1997).

## E. Factors that Affect Relationships

### 1. Economic Considerations

Personal relationships between older adults and others are sometimes affected by financial considerations. In Canada, older adults often help their grown children through loans or gifts to help achieve personal goals such as getting their first house, starting a business, or during unemployment.[21] Older adults are often perceived by their children (and by business) as an important financial resource that family members can turn to in times of need. People who give care informally may be expecting some form of consideration or compensation for giving that assistance to older adults, particularly if they are not immediate kin or if it is not short-term care. Sometimes family or others take on the role of formal or informal guardians of an older adult's financial resources. They then have *de facto* control over much, if not all, of that person's life.

### 2. Education and Literacy

Personal relationships may depend on the relative power, resources, and ability of the parties to bargain for fairness in their relationships and what they expect from their relationships. Six out of ten seniors function at much lower levels of education, on average, than younger adults.[22] In 1996, 25% of seniors had attended but had not graduated from high school, and 37% had never attended high school. Almost half (48%) of all people aged 85+ had never attended high school. Partly as a result of their relative lack of formal educational experience, older adults are also much more likely to have low levels of literacy, making them more reliant on personal relationships for help in certain financial and legal matters (e.g. understanding legal documents).[23] This is a changing phenomenon, as new generations who had more schooling, in turn, become old.

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[21] C. Spencer, *Diminishing Returns: An Examination of Financial Decision Making, Financial Responsibilities and Financial Abuse Among Seniors* (Vancouver, B.C.: Gerontology Research Centre, 1995).

[22] Statistics Canada, *the 1996 Census of Canada*; and *the 1994 International Adult Literacy Survey*. See P. Roberts & G. Fawcett, "At Risk: A Socio-economic Analysis of Health and Literacy Among Seniors" in Statistics Canada, *International Adult Literacy Survey* (Ottawa: Statistics Canada, 1998) Cat. no. 89-552-MPE, No. 5.

[23] *Ibid.*

# CHAPTER II

*There is nothing inherently problematical about growing old. And yet in most nations of the world, old age is increasingly understood in 'social problem' terms.*

~ L. Tornstam [24]~

# The Social Sciences Literature on Older Adults' Personal Relationships

In this chapter we define the central concept of older adults' personal relationships from a social sciences perspective. We are guided by several questions: What is implied in this concept? What are the personal aspects of these relationships as opposed to professional or formal (paid) relationships? How can those ideas be applied in a legal context? How are they currently applied? When and how does the law become involved in these relationships?

This chapter considers personal relationships of older adults as described in the social science literature. A large part of this is concentrated on social and family gerontology and social psychology as applied to older adults. The literature is not without contradictions within and between areas of specialization. The social sciences literature on the family rarely mentions older adults as family (while gerontology literature covers the roles of older adults in families).

Each person's ageing process is unique and personal needs vary greatly from one older adult to another. However, certain common issues arise. One is that ageing tends to represent a decline in health and abilities. Gerontologists now argue that any *early declines* in health and abilities probably reflect specific pathology, rather than the effect of ageing. At some point in every life, however, age-related losses accumulate and may produce a potential crisis for the older adult. At such times, the individual's personality, personal and social resources, as well as personal relationships and the support of family and friends can critically affect the outcome of how well the older adult is able to adapt, and his or her long term well-being. [25] While some decrease in abilities may be expected in all adults, the type of change, the extent of the problem, and how it affects the person will be very different among seniors.

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[24] L. Tornstam, "Solidarity between the generations - a Janus-faced appeal" (1995) XXII(3) Aging International 23-27.

## Defining Older Adults' Relationships

Older adults' personal relationships have been examined through a variety of disciplines that consider different aspects of ageing. Gerontology is a multidisciplinary field that attempts to integrate these diversities.

"Older adults' personal relationships" is a multidimensional concept that can be defined through a series of questions relating to parties, context, and value:

- Who is in a relationship with whom?
- What is the context of the relationship?
- What is the objective value of the relationship ?
- What is the subjective value of the relationship?

From the outset, it will be important to recognize the diversity of types of relationships for older adults; the stage of life when the relationship began for the person; the role of the relationship; the layers of relationships; expectations on both sides of the relationship; and changing dynamics of those relationships over time. Many factors affect the relationships. Relationships will differ depending on factors such as personal and social resources available to the older adult, the cultural background, whether the older adult lives in an urban or rural setting.

Gerontology currently concentrates a significant amount of its work on understanding the key elements of "successful ageing". Despite the diversities in theories, there are always two components to a successful ageing: 1) what people expect of themselves as they age (self-expectation) and 2) how society expects people to act, behave, and change as they grow older. There are three major theories in social psychology offering different points of view on growing old: disengagement theory, activity theory, and continuity theory.

According to the disengagement theory a successful ageing is characterised by an older person's inevitable withdrawal from former roles, leading to diminished interactions with others and a reduction of an older person's social support system. This withdrawal is seen as reciprocal (the older adult withdraws from society and society withdraws from the older adult). According to this theory, the older adult's personal relationships will diminish not only in quantity over time, but also in quality.[26] These relationships would tend to be less profound and committed.

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[25] R. O. Hansson & B. N. Carpenter, *Relationships in Old Age* (New York: Guilford Press, 1994) at 4.

In marked contrast, the activity theory stresses that older adults do not voluntarily give up roles, they are often subtly (and not so subtly) pushed out of them. "Successful ageing" from the activity theory perspective is one where the older adult becomes *more involved* in social activities to maximize their old years. Here, successful ageing is directly proportional to the quantity of activities.

The continuity theory states that successful ageing occurs when the person follows whatever pattern she or he had before in life. According to this theory, a person who adapts well to different life experiences and different roles has better chances to adapt to the changes associated with growing old. The central postulate of this theory is that older adults tend to protect and maintain the internal and external structure of their relationships. According to this approach, personal relationships in later life are tinted by the ones from the past. This does not mean that the relationships do not change, they simply evolve.

## A. Roles

Successful ageing is often studied as people's ability to fulfil the roles related to age. Almost all work in social gerontology includes the question of older adults' relationships. It is addressed in different ways, but the main question is related to older adults' *social integration* with others and older adults' interactions with others. Relationships can affect social functioning and life functioning and they may have outcomes in health issues, living arrangements and social integration.[27]

The social role of the older adult has always been a key issue to understanding the ageing process. In family gerontology literature, the description of families and ageing is frequently framed so that older family members are outside family boundaries, as essentially *non-members:*[28]

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[26] E. Cumming & E. H. William, *Growing Old: The Process of Disengagement* (New York: Ayer Company Publishers, 1961).

[27] *Supra* note 25.

> *Too often older adults are seen as problems for families to solve or bear, rather than participants in family decision-making, as kinkeepers, as equal in relationships. Older person's contributions to their families and the mutuality and reciprocity of interactions is often ignored, as is the probability that their care involves a long history of interrelationship between the old members and other members who are candidates for becoming their caretakers or decisionmakers. [emphasis added]*[29]

In social gerontology, the primary roles in older adults' personal relationships are defined as family roles, particularly those of parent, spouse, and grandparent. Spousal relationships have often changed over the span of marriage. Spousal relations in later life can differ significantly depending on whether marriage took place in early life, middle or late life, whether this is a first or second marriage, and whether the relationship has grown (matured) with the passing years.

Kinship roles continue to be significant to older adults' ties to the social world, and these ties are especially durable in old age.[30] Although other roles may be lost, it is unlikely that an older person will be totally without kin[31]. Older people, then, retain ties to the family and these roles may increase in their relative importance in later life, as other roles decrease or shift.[32] Certain kinds of kinship roles, such as relationships with grandchildren and nieces or nephews, continue on paths set early in life, but these can be affected by geographical distance, divorce, remarriage and custodial arrangement of the children/ grandchildren.

## B. Chosen Relationships

A relationship with kin is one that is imposed by blood or marriage. Choice is limited to the extent to which one wishes to be involved with kin generally, or with specific kin. Friendship is different because it is a relationship that is usually chosen. In the gerontological literature, the role of friends as personal relations has gradually been recognized as extremely important. For healthy older persons, contact with friends and peers are more important to a sense of well being than increased contact with family members.[33]

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[28] L. S. Morgan, "Social Roles in Later Life: Some Recent Research Trends" in C. Eisdorfer, (1982) 3 Annual Review of Gerontology and Geriatrics 55-79.

[29] L. Troll, "Foreward" in R. Bliezner & V. Bedford, eds., *Handbook of Aging and the Family* (Westport, Conn.: Greenwood Press, 1995) xi-xix at xiii.

[30] *Morgan, supra* note 28.

[31] E. Shanas & G.F. Streib, *Social Structure and the Family, Generational Relations*. (Englewood Cliffs, N. J.: Prentice-Hall, 1965).

[32] *L. Troll, supra* note 29; and *Morgan, supra* note 28 at 64.

For older adults, as with people of any age, there can be important differences between old friends and new friends; there are also differences between "friends" and "close friends".[34] The latter have often endured for many years. Close friends are often neighbours (people nearby), however there can be long distance, enduring relationships as well.

Older adults who are childless are more likely to seek companionship from friends and other relatives than do seniors who are parents.[35] While friends tend to be similar in age, many older adults also have relationships with younger individuals. These resemble quasi-familial ties, with the other person often being described as "just like a daughter".[36]

## C. Characteristics of Relationships

Somewhat surprisingly, the gerontological literature talks very little about what makes a particular situation between two or more people into "a relationship". The most insightful questioning has come from the literature on friendship.[37] Positive friendship relationships are based on the concept of trust (knowing when to keep silent and when to divulge); and the concept of loyalty (to stick with one another through good times and bad). These relationships may be assymetrical

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[33] J.A. Mancini, "Friend interaction, competence and morale in old age" (1980) 2(4) Research on Aging 416-431.

[34] H. Macrae, "Strong and enduring ties: older women and their friends" (1996) 15(3) Canadian Journal on Aging 374-392.

[35] I.A. Connidis & L. Davies, "Confidants and companions: choices in later life" (May, 1992) 47 (3) Journals of Gerontology S115-S122; I. Connidis & J. Mcmullin, "Getting out of the house: the effect of childlessness on social participation and companionship in later life" (Win. 1992) 11(4) Canadian Journal on Aging 370-386.

[36] H. Macrae, "Fictive kin as a component of the social networks of older people" (Jun. 1992) 14 (2) Research on Aging 226-247.

[37] T. Antonucci & H. Akiyama, "Convoys of social relations: family and friendships within a lifespan context" in R. Bliezner & V. Bedford, eds., *Handbook of Aging and the Family* (Westport, Conn.: Greenwood Press, 1995) 332-355; R. Blieszner & R. G. Adams, "Problems with Friends in Old Age" (1998) 12(3) Journal of Aging Studies 223-238; N.L. Chappell, "In-group differences among elders living with friends and family other than spouses" (Spr. 1991) 5(1) Journal of Aging Studies 6-76; *Macrae, supra* note 34.

(one giving more than the other), but because they have been long standing, they are still considered as "fair" ("it all evens out in the end.")

Sharing is another characteristic of friendships, as are emotional and other forms of support. These friends not only say they will be there, they are when the older adult is in need (the behaviour coincides with belief). For some older adults, friendship becomes an increasingly selective process. People decide whether or not it is worth their while to "invest" their remaining time, energy and resources on establishing a relationship in the first place, and whether or not to maintain existing relationships. For some older adults, having had first hand experience with the problems that relationships can lead to means they now aproach new relationships with more caution.

A personal relationship to a large extent reflects *choice*, to be involved or not be involved with another person. Although one does not choose one's family, family relationships are typically considered a form of personal relationship, where a person *chooses how much* to be involved with individual members of the family, or with family at all. Marriage obviously is a personal relationship. Friendships are often considered as an important type of personal relationship.

Each relationship involves at least two individuals. The more individuals are involved, the more complex the potential interactions can become. An ageing parent responds not only to each grown child/friend/neighbour in different ways, but also reacts to the responses of those people to each other (brother to sister; daughter to new friend). They, in turn, are in some form of relationship (positive, negative or somewhere in between) with those others.

A personal relationship typically involves having a history together. The relationship may or may not be based on equal positions. It may or may not be based on trust or a sense that the relationship is "fair". Personal relationships differ from other types of relationships in that they often, but not always, involve continued involvement (sometimes over periods of years or decades).

## D. Responsibilities within Relationships

There are two major themes in gerontological discussions of older adults' personal relationships that reflect ideas about familial responsibilities. The first is "social support". This is primarily framed in terms of help that is given by others (typically family) to older adults. The second is caregiver strain. Both offer a somewhat negative perspective on older adults' personal relationships. In gerontological literature, discussions of parent-child relationships in later life are often framed around parental dependency, role reversal, and parents moving in with children because of illness.[38] "This dominant paradigm obscures relationships in which the parent is in good health—the state that characterizes a majority of the older population." [39]

### 1. Social Support

The social support literature tends to focus on direct assistance with daily personal and household needs, companionship, and serving as a confidant. The literature historically has tended to focus on this as a one-way effort, with far less consideration given to the types of support that the senior gives and the types of roles that he or she plays. The literature frequently operates from the position that the senior is someone who is frail and dependent on others, thus needing to be supported in some manner. It also tends to focus on the support given by family and others as sometimes creating stresses and strains to the family.

There has been a slowly growing recognition in the literature, that this view of relationships in later life is skewed: "The idea that older adults pose only burdens for other family members or are socially isolated from contacts with other family members appears to be more of a myth than reality."[40] Recent literature and research, particularly that focussing on "mutual help" or "reciprocal aid," emphasizes two-way interactions and the interdependence in relationships, where people give each other different types and amounts of support at different points in time over the life course.

Older adults live in informal networks that act as a support system. In these networks, they seek help *and* provide assistance or resources. The relationship contributes to their sense of security, their perceptions of personal worth, and their continued social competence. [41]

For example, according to the 1991 Survey on Ageing and Independence, 69% of seniors report regularly *providing one or more types of assistance* to others. Fifty-nine percent of seniors report that they regularly *receive assistance from*

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[38] J. Suitor et al., "Aged parents and aging children: determinants of relationship quality" in R. Bliezner & V. Bedford, eds., *Handbook of Aging and the Family* (Westport, Conn.: Greenwood Press, 1995) 223-242 at 223.

[39] *Suitor, ibid.*

[40] B.J. Cohler & K. Altercott, "The family of the second half of life: connecting theories and findings " in R. Bliezner & V. Bedford eds., Handbook of Aging and the Family (Westport, Conn.: Greenwood Press, 1995) 59-94.

[41] C. Peterson & J.L. Peterson, "Older men's and women's relationships with adult kin: how equitable are they?" (1988) 27(3) International Journal on Aging and Human Development 221-231.

*others* (in other words, more older adults say they give more than they receive). Among seniors aged 80 and over, the rate of giving assistance continues to be moderately high (54% in this age group continue to give assistance to others).[42] Seventy-three percent of those aged 80 and over receive asistance from others.

The literature points out that there are differences between older men and older women in who they help. In rank order, men aged 65 and over help their spouses, then their friends and neigbours, their daughters, their sons, and their grandchildren. Women rank differently—they help friends and neighbours first, their daughters, their spouses, their sons, and grandchildren. This may be because men tend to predecease women. Once widowed, women tend to help others, particularly other widows.[43]

The Ageing and Independence Survey also points out that for all age groups and throughout the life span, emotional support is the most common form of support people give each other.[44] Other surveys have also shown that older adults maintain an important financial role in families, with the vast majority (87%) contributing money or other resources at important points in their children's lives, such as the first apartment, down payment for the first home, or upon divorce or unemployment.[45] Thus, while the common public perception is that many seniors need support from others, the reality of contemporary family life includes older family members as continuing sources of socialization, caregiving, and financial support for younger generations.[46]

### 2. Strain

Family caregiving, and particularly caregiver strain is frequently mentioned in the gerontological literature. However, it is important to put this in context, and understand who exactly is bearing the strain. Contrary to popular belief, caregiving in most ageing relationships is given by one's spouse, not one's children. Numerically and percentage-wise, a "sandwich generation" who are giving care to their children and their ageing parents is still a very small facet of the overall profile of ageing relationships.[47] However, we should not downplay the challenges and strains that those who are in these types of relationships can experience.[48]

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[42] Statistics Canada, *Aging and Independence: Overview of a National Survey*, Cat H88-3/13-1993E (Ottawa: Minister of Supply and Services, 1993).

[43] *Cohler et al., supra* note 40 at 74.

[44] *Supra* note 42.

[45] C. Spencer, *Diminishing Returns: An Examination of Financial Decision Making, Financial Responsibilities and Financial Abuse Among Seniors* (Vancouver, B.C.: Gerontology Research Centre, 1995). A common comment among the other 13% who do not contribute in this way, was "We have alread done the important part, we raised them."

[46] *Cohler et al., supra* note 40.

To some extent, the emphasis on caregiving and strain reflects the two sides of personal relationships. The bright side reflects the benefits of relationships such as helping each other through emotional support (listening, empathizing, being there, being a confidant), by specific activities (instrumental support), and by giving or helping to get needed information. The darker side reflects costs of caregiving such as demands on the person's time, each person's emotional vulnerability, and the need for mutual compromise.

### 3. Avoiding Burden

In contrast to the focus within gerontological literature on strain, many older adults express the importance of "*not being a burden*" on their family, either economically or in terms of responsibilities.[49] Older women, in particular, experience a cultural imperative to not be burdensome. They stress both their independence and their wish for security. They can feel guilt and shame in not living up to these expectations.[50] This older generation often does not wish family to intervene. They want to avoid creating possible additional physical, social and emotional hardships for their children and family. Older adults express the desire to remain self-sufficient, independent and living in their own homes as long as physically possible. Many older adults prefer "intimacy at a distance" when it comes to family and family involvement. They also value personal privacy, which may be lost where people feel forced to be together.

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[47] M.J. Penning, "In the middle: parental caregiving in the context of other roles" (1998) 53 Journal of Gerontology. S188-197. See also C.J. Rosenthal, A. Martin-Matthews & S.H. Matthews, "Caught in the middle? Occupancy in multiple roles and help to parents in a national probability sample of Canadian older adults" (1996) 51B(6) Journals of Gerontology S275-283.

[48] J.A. Tindale et al., *Intergenerational Conflict and the Prevention of Abuse Against Older Persons* (Ottawa: Health Canada, Family Violence Prevention Unit, 1995).

[49] J.A. Mcmullin & V. Marshall, "Family, friends, stress and wellbeing: does childlessness make a difference" (1996) 15(3) Canadian Journal on Aging 355-374.

[50] J. Aronson, "Women's perspectives on informal care of the elderly: public ideology and personal experience of giving and receiving care" (Mar. 1990) 10(1) Aging and Society 61-84; J. Aronson, "Older women's experience of needing care: choice or compulsion?" (Aut. 1990) 9 (3) Canadian Journal on Aging 234-247.

### 4. Personal and Social Assumptions about Relationships

Family members often have certain assumptions and expectations about what their relationships with their parents should be like and the ways in which they are involved in each other's lives. Grown children's personal relationships with their parents can reflect the tension between their own financial and psychological needs, their personal resources, and their expectations and those of their ageing parents. People sometimes assume that older adults want or need more family involvement. For example, they may believe that older parents would like to live with family if they become widowed or if their health is failing. For older women, at least, the reality is different. Many older women cherish their independence at this point in their lives.[51]

Personal relationships can also reflect certain societal assumptions about ageing (e.g. the perception that older adults do not need money, or that grown children are entitled to their parents' assets). Or, they may reflect commonly held beliefs or misconceptions, such as, that older adults create an unfair demands on families' personal resources and our social resources.

## E. Changes within Relationships

### 1. Marriage

The gerontological literature describes the mature stage of the marriage as a period where older adults are redefining their intimacy, and their interactional patterns and roles may be changing. They may be setting new goals and validating all stages of marriage. Couples are often fostering the ability to live together without undue concern about the illness or death of either spouse. They are learning how to provide nurturing, even if the physical or mental problems of a spouse limit his or her ability to reciprocate. During this stage, couples are developing the capacity to mourn losses (of their health, roles, impending death) while maintaining a meaningful relationship. They are often letting go when a spouse dies or is not able to function. They are often acquiring the ability to view themselves as a separate individual in the face of the illness or death of a spouse.[52]

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[51] *V. Doyle, supra* note 11.

[52] M. H. Huyck, "Marriage and close relationships of the marital kind" in R. Bliezner & V. Bedford, eds., *Handbook of Aging and the Family* (Westport, Conn.: Greenwood Press, 1995) 181 at 196.

Older women and older men can differ in their satisfaction and expectation towards their spousal life.[53] With regard to marital satisfaction, older men tend to express more marital satisfaction generally than women. Older men tend to focus more on instrumental aspects of the relationship (mutual help to accomplish daily tasks, preparing the meals, cleaning the place, physical care) when explaining why they are satisfied. Older men tend to be less sensitive to the quality of the conjugal relationship. In contrast, when asked to evaluate their satisfaction with their relationship, older women refer more to affective aspects (emotional support, dialogue, sharing of interest, communication, and respect of autonomy).

### 2. Children

Change also occurs in relationships with grown children. It is suggested that many grown children mature (they develop "filial maturity") and, as a result, differences between parents and adult children become reduced. There can be gender differences in how that develops, with greater closeness in mother-son and father-daughter pairs, than for father-son pairs.[54] It is generally recognized in the literature that sons provide tangible support to their parents while distancing themselves emotionally. Daughters tend not to have this emotional buffer and are deeply involved with their parents' emotional needs.[55] Adult children motivated by attachment rather than exchange or obligation, experience better quality relationships with their parents in later life.[56]

Yet, at the same time, it is very important to not downplay the fact that there can be significant differences in values between older adults and their children. There have been significant changes in generational attitudes within the last three decades, including whether to openly declare sexual orientation, whether there is a *need* for marriage, whether or not to have children (in or out of marriage), whether or not to divorce, and how to handle finances. Older adults and younger adults often see these matters in very different ways, which can create very sore spots within relationships.

There can also be significant dysfunction and antipathy in some relationships between older adults and family members. In many cases this has lasted a lifetime. "Feelings between parents and children who have been in close communication for 50 or more years are predictably complex. Where love is to be found, so is hate."[57]

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[53] F. Ducharme, "Santé et satisfaction maritale, deux dimensions de la qualité de vie des conjoints âgés" (1993) 15 (4) Le Gérontophile 23-28.

[54] *Suitor et al., supra* note 38 at 227.

[55] *Tindale et al., supra* note 48 at 9.

[56] *Suitor et al., supra* note 38 at 225.

It is pointed out that conflict, deception and violation of trust in families is not rare.[58] Sometimes the younger person is the one who cheats, lies, steals or betrays a confidence. Sometimes the older person has. In either case it undermines the support potential of the family support system in the long run.

There are other factors too. Tindale *et al.* suggest "The history and nature of communication patterns within the family, the affectionate quality of relationships, and even problem solving skills are more likely to improve our understanding of how situations ... can help build a simmering pot that one day boils over as abuse."[59]

It is also recognized in the social sciences literature that adult children and elderly parents have strong reciprocal effects on one another. In particular, negative effects in the lives of either children or parents affect their relationship.[60] Widowhood of a parent involves a direct change in the lives of the adult children too. It can affect living arrangements and new roles on both sides. Family interactions can increase in the first year and then decrease, particularly upon dating and remarriage.

The effects of illness, death and bereavement can become important turning points in relationships. Older adults can be faced with the death their own parent, death of a sibling, death of an adult child, and their own spouse. These multiple losses can affect many older adults' personal relationships and how they respond to the remaining relationships.[61]

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[57] *Mcmullin & Marshall, supra* note 49.

[58] Hansson et Carpenter, supra note 25 at 35. *Tindale et al., supra* note 48, suggest that family conflict (and potentially abuse) is more likely to arise:

- Where aging parents and grown children live together (co-residency, particularly in the people have not been able to successfully negotiate acceptable roles and boundaries);
- When the children feel that they are providing considerable intangible support;
- Where there is a perceived inequity in the support between parents and children (particularly when the children feel obligated to assist, having to choose between assisting parents or pursuing other interests, or where children feel they aren't being allowed to grow up and become autonomous);
- Where siblings have perceptions of inequitable support for parents ("I give more than you do. I get over there, why can't you?").

[59] *Tindale et al., supra* note 48 at 11.

[60] K. Pillemer & J. Suitor, "Will I ever escape my children's problems? Effects of adult children's problems on elderly parents" (Aug. 1991) 53(3) Journal of Marriage and the Family 585-594.

[61] *Shanas & Streib, supra* note 31.

## F. Cultural Diversity in Relationships

It is important to recognize the cultural diversity in the later life family. The immigrant family in most groups is characterized in the literature as "traditional", with high family contact.[62] This "traditionalism" has a hierarchical structure with older members dominant over the younger, and males dominant over the females. Such values as respect, obligation, and interdependence represent the cultural domain of ethnic family life.[63]

At the same time, the literature stresses generational change within a culture. Second generations display diverse family types and the third generations are moving toward a nuclear model that is more like a private autonomous unit relatively isolated from kin.[64] Within this context, older adults' personal relationships with other generations can be faced with tensions as succeeding generations modify their value orientations.[65] The cultural differences can reflect important differences among cultures, some focussing on independence and intimacy *from* family, and others stressing intimacy and interdependence among family members. There are also ethnic differences in later life friendships, in terms of numbers of friends, frequency of contact and satisfaction with those friends.[66]

## G. Summary from Social Sciences

Social sciences literature tends to ascribe certain kinds of ties (such as family) as being personal relationships for older adults. There is considerably more literature on family than on "chosen relationships" (friendships). Although gerontological literature purports to look at ageing from a positive perspective, much of the literature on different aspects of relationships focuses on relationships in a one-way fashion, assuming that older adults are the recipients of and not contributors to the relationships.

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[62] C. Johnson, "Cultural diversity in the late-life family" in R. Bliezner & V. Bedford, eds., *Handbook of Aging and the Family* (Westport, Conn.: Greenwood Press, 1995) 307 at 309.

[63] *Ibid.*

[64] *Ibid.* at 310.

[65] *Ibid.* at 317.

[66] B. de Vries, C. Jacoby & C.G. Davis, "Ethnic differences in later life friendship" (Sum. 1996) 15 (2) Canadian Journal on Aging 226-244.

The gerontological literature typically has examined older adults' relationships, at a distance and from the outside looking in (creating an "us" and "them" situation). Until recently, the research in this area has examined the phenomenon of ageing as if it were somehow removed from the lived experience of the scientific observer and us all. There is now a paradigm change in social sciences to give more importance to the concerned social actor and his or her experience, describing growing older as how it feels from those going through the different phases of ageing. This change, combined with the social power gained by the babyboomers, may lead to changes in the way we conduct research in gerontology.

To answer our four questions first raised at the beginning of the chapter, *from a social sciences perspective*:

1. *Who is in a relationship with whom?*
   It would be an older adult in contact with a family member and/or anyone who is significant to them.

2. *What is the context of the relationship?*
   It would be any context where the relations are based on personal interactions. There is often a shared history together, and emotional connections between the parties.
   As stated earlier, personal relationships sit in contrast to professional relationships or social relationships.

3. *What is the objective value of the relationship?*
   Can we state that one relationship is better than another one? It is difficult to answer but it is clear that some older adults, like adults of any age, can have relationships that appear to be dangerous for their emotional, physical or financial security. Are these relationships necessarily bad for them? We need to answer carefully. It is very easy to adopt a protectionist point of view or a judgmental point of view on adults' relationships when they are older.

4. *What is the subjective value of the relationship?*
   The subjective value of the relationship can only be appreciated from the persons involved in the relationship: from the point of view of the older adult, and the point of view of the other.

# CHAPTER III

*Law and justice are not always the same. When they aren't, destroying the law may be the first step toward changing it.*

~ Gloria Steinem ~

# Legal Literature on Older Adults

This chapter considers the ways that legal literature addresses older adults and their relationships. In particular we examine what "elder law" has to say about the concept, and how the law and legal practice has tended to view older adults.

We live within a pluralist society made up of diverse communities. A legal system must generate rules and doctrines and resolve disputes within that context. The law -- whether legislative or judicial -- must be justifiable to those many parts of society. It must be based on a foundation that purports to accurately describe the world as it really is, and with an understanding of personal relationships as they really are.

To best understand how the legal literature has tended to view older adults and their relationships, it may be helpful to start by considering how the literature has tended to view older adults and ageing. To a large degree, older adults have not been an explicit topic of the legal literature, in contrast to "Women and the Law" or "Children and the Law". This may simply reflect an assumption that older adults are essentially the same as younger adults, or it may reflect a perception that older adults are external to the functioning of the law.

## A. The Development of Elder Law

Elder law, a specific area of specialized practice focussing on older adults interests, is still in its infancy in Canada.[67] Although universities may offer law and ageing courses to social workers and nurses,[68] Laval is the only law school in Canada to currently have a course on law and ageing. There have been very few Canadian legal forums in the past 20 years talking about legal issues affecting older adults.[69] There is only one Canadian centre (the Advocacy Centre for the Elderly in Toronto) that specializes in legal issues affecting older adults and focuses its practice on increasing their access to justice.[70]

Elder law practice began in the United States approximately thirty years ago with the development of the *Older Americans Act*.[71] The Act led to the creation of a network of legal services for older adults to monitor the actions of the state, local, and federal agencies as they administered programs designed to benefit older adults. As a result, the American elder law literature has tended to focus not on relationships, but more on older adults as recipients of program benefits.[72] It was felt that as people entered later life, they were more likely to encounter legal difficulties, particularly in light of the fact that they were changing and they would be facing complex and ever changing rules and regulations of government bureaucracies to receive care, old age security or other benefits.[73]

As a result, elder law focuses on the needs of a particular population, not a certain cluster of laws. In some cases, elder law is seen as overlapping with disability law. Elder law practitioners have tended to work from a traditional (as opposed to critical) framework. Areas of substantive law that affect older adults the most in their personal lives have been subjected to very little critical analysis.[74]

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[67] American and British titles on the subject include: L.A. Frolik & Richard Kaplan, *Elder Law in a Nutshell* (St. Paul, Minn.: West, 1995); A. Frolik, & M. Brown, *Advising the Elderly or Disabled Client* (Englewood Cliffs, N.J: Thomson Professional, 1992); A. Mcdonald & M.E. Taylor, *The Law and the Elderly* (London: Sweet and Maxwell, 1995).

[68] These courses generally focus on incompetency issues.

[69] One notable exception is the "Older and Wiser: Wrinkles in Boomer & Elder Law" conference which was held in Toronto, May, 1999 for lawyers and "elder care professionals". It was sponsored by the Canadian Bar Association, Ontario Branch in recognition of the International Year of the Older Person.

[70] The Centre has lawyers specially skilled in aging issues and knowledgeable about how legal issues can affect older adults differently. This gives them the opportunity to better present older adult's interests.

[71] U.S.C. Title 42 *The Public Health and Welfare, Chapter 35, Programs for Older Americans*. Enacted 1965.

[72] P. Nathanson, "Elder law" in Marjorie Smith, & Karen M. Imeson, eds., *Law and the Elderly*, Proceedings of a Conference held April 6 to 8, 1978 at Sheraton Landmark Hotel (Vancouver, B.C.: Centre for Continuing Education, University of B.C., 1978)

[73] *Ibid*.

The term "elder law" tends to bundle together a variety of legal work that can be roughly divided into two categories: (1) health law issues and (2) income and asset protection and preservation.[75] It has been pointed out that older clients have a higher incidence of legal problems associated with their health than do younger persons: "First [older adults] are in poorer health. In particular they suffer more chronic illness and they suffer more severe incidents of acute illness than those younger. In addition, the elderly suffer the inevitable physical decline associated with ageing."[76] Interestingly, people have not yet begun asking "Why is there a nexus between older adults' legal and health problems in the first place? What types of assumptions about people, ageing, and disability are leading to these legal issues arising?"

The tenor of much of the writing in "elder law" continues to focus heavily on physical decline. As this quote from a newly published book on law and ageing describes it:

> *It is this physiology of the ageing person that is the foundation of the concept of old age and of elder law.*[77]

In this view, physiology becomes an older adult's manifest destiny. Not all writers take this approach. Author Robyn Wacker notes that the elder law can and should operate from the standpoint, not of segregation and separation of older adults' interests, but from the perspective of understanding how their needs might be different from those of other adults.[78] Many legal issues will have a different impact on older adults when compared to younger adults facing similar issues.[79]

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[74] R. Korzec, "A feminist view of American elder law" (Spr, 1997) 28 University of Toledo L.R. 547-561

[75] L. Frolik, "'What is Elder Law?' The developing Field of Elder Law: A Historical Perspective" in L. Frolik, ed., *Aging and the Law* (Philadelphia: Temple University Press, 1999) at 4.

[76] *Ibid*.

[77] *Ibid*. Chap. 4, Intro, Who is Old? at 29.

[78] R. Wacker, "Legal issues and family involvement in later life families" in R. Bliezner & V. Bedford, eds., *Handbook of Aging and the Family* (Westport, Conn.: Greenwood Press, 1995) 284-306.

[79] *Ibid*. at 285.

## B. How the Law Perceives Older Adults

### 1. Looking at Age and Aging in the Legal Literature

#### (a) Legal Issues

There are very few articles written for lawyers about ageing, or legal issues related to growing older. There is an even greater lack of Canadian literature on the topic, and as a result Canadian practitioners' understanding of the issues are coloured by American political and social values imbedded in the discussions.

There has been has been very little investigation of the impact of substantive law and the litigation process on the rights of older adults'.[80] In discussing subjects of law that likely affect a disproportionate number of older adults, (e.g. substitute decision-making, health care), there is seldom any mention of the important fact that these are largely older adults' issues. The subject matter is treated as neutral: neutrally applicable to all people and affecting all in a similar fashion. Older adults are objectified -- treated as objects of the law. In this process, they are subject to "neutral principles of law". The issue becomes the thing, not the older person behind the issue.

#### (b) Areas of the Law

Older adults legal interests are typically described as arising within two main legal contexts, first, vulnerability and, second, death. The former involves matters such as guardianship, adult protection ("elder abuse"), mental incapacity and substitute decision-making. The latter involves wills and estate planning. Those two ways of characterizing older adults ("deteriorating" and "dying") subsequently becomes reflected in how the law, those who apply the law, and those who practice it come to see older adults' personal relationships.

#### (c) Legal Practice

There is a general lack of legal articles written about older adults, their needs and issues. This is the case for the general practitioner and for service providers and others who could refer the older adult to lawyers. Existing articles written about representing older clients tend to stress (directly and indirectly) that older adults are different than the rest of the client population. Invariably, there is discussion and concern about older adults' differences as a result of the ageing process. Articles typically mention their potential incompetence or some degree of mental impairment.[81] Even articles that overall are positively worded will stress older clients' limitations [82]

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[80] L. Forer, "Law and the elderly" *Unequal protection: Women, Children and the Elderly in Court* (New York: Norton, 1991) at 227.

Legal writers raise basic questions in the literature about professional responsibility towards older adults. Lawyers are constantly being cautioned to understand who their clients are -- that is, it is the older client, and not necessarily the family member accompanying them.[83] The underlying message is that lawyers may tend to act inappropriately with an older client out of prejudice or paternalism by erroneously assuming that a family member's interest will be the same as the older adult's.

American writers note that Model Rules fail to provide adequate practical guidance to the elder law practitioner.[84] The problems exist from the beginning -- the ethical rules don't clearly define client.[85] The same problem exists in Canada. It is not uncommon for a person who is older to arrive at the office with a family member.

Adams and Morgan note:

> *Although the family member may have the best interest of the older relative in mind, there are inevitably, conflicts. ...The difficulty for the practitioner will vary depending upon familiarity with the persons seeking assistance and their relationships with each other. If it is a new client, the attorney will often be unable to identify the personal dynamics between the individuals.*

The authors stress "It is crucial to explore the relationship of the third party to the client. Is this person a relative, a friend, or a virtual stranger?" ..."Is the person there for reassurance, to supply crucial information, or perhaps to influence the client's choice of conduct?"[86] These are important questions. However, it is also important to consider what assumptions about relationships the practitioner is bringing to the table, once he or she knows the general nature of the person's relationship to the older adult.

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[81] W.T. Burke, "Avoiding pitfalls when counselling the elderly" (Spr. 1998) The Compleat Lawyer 13-19.

[82] L.F. Smith, "Representing the elderly client and addressing the issue of competence" (1988) 14 Journal of Contemporary Law 61-104.

[83] *Ibid.*

[84] W. E. Adams & R. Morgan "Representing the client who is older in the law office and the court room" (1994) 2 Elder Law Journal 1 at 13.

[85] *Ibid.* at 13.

[86] *Ibid.* at 15.

### (d) Legal Barriers for Older Adults

In the last five years, there has been a small but slowly growing number of articles pointing out that older adults experience significant challenges in having their rights respected and enforced. For older adults, there are numerous systemic and environmental barriers to justice. First, there is the expense of litigation. This problem is shared by younger persons too, but older people are often on fixed incomes. Some older adults have an antipathy towards lawyers and the legal system.[87]

There can be barriers in court. The older client also may not outlive the delays which often occur during litigation.[88] An older client is often intimidated by the thought of going to court. As one American judge points out: "Almost every time an elderly person comes to court the experience is traumatic and difficult. Because the rules and procedures fail to take into account the individual's condition, the result is often legally sanctioned denial of equal protection of the laws."[89] "Most witnesses of any age find testifying in court an ordeal. For the elderly it is especially frustrating because they are not permitted to tell their stories in their own way."[90]

Most courthouses were built to accommodate a healthy, 30-year-old male, not an 85- year-old woman in a wheelchair. Lawyers need to be sensitive to the barriers and seek reasonable accommodation from the court in order to overcome them.[91] Adams and Morgan note that as more lawyers turn to elder law as a practice, there will be an increased need for the legal bar and law schools to provide guidance concerning approaches lawyers can use to overcome these barriers.

## 2. Looking at Older Adults within the Law

There are three contradictory responses to older adults in the law:

a) *ignore they exist;*
b) *treat them as frail, incapable, vulnerable, or in need of special protection;*
c) *treat them as exactly the same as younger adults, even when there are obvious differences necessitating different treatment*

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[87] *Ibid.* at 11.

[88] *Ibid.* at 25.

[89] L. Forer, "The elderly in court" Unequal protection: Women, Children and the Elderly in Court (New York: Norton, 1991) 210 at 226.

[90] *Ibid.*

[91] *Adams, supra* note 84 at 26.

> *under the law (assumed equal ("neutral") application of the laws affecting adults and older adults.)*

It has been suggested that the common law in general has not treated older persons any differently than a competent adult of any age.[92] Review of the literature belies this "age neutrality". Older adults frequently are treated differently in the law, its application and its practice. For example, adult protection laws of the Atlantic provinces ostensibly serve all "vulnerable" adults, but 60-70% of the clients are older adults.

Age (specifically old age) has been extensively used as a criterion for legal eligibility and differentiation in statutes during the 19th and 20th century. The use of categorizing people by age has invaded education, industry and family life. This development has not been without its detractors. It has been cautiously suggested that having a separate area of law and legal practice may inadvertently promote "the pernicious belief that older persons are less capable, less deserving of respect, and less needful of independence and autonomy."[93] In other words, it is feared that law is (or can become) ageist.

Age has not traditionally been treated as a separate category in the common law. However, in common law, advanced age is noted "when relevant". In particular, the law has always assumed a nexus between advanced age and mental competency, and the law has tended to assume that old age might be a signal of decreasing capability.[94] There is, thus, a strong "age consciousness".[95]

### 3. Personal Relationships in the Legal Literature

Discussion of older adults' personal relationships in the legal literature tends to focus on several themes: a) personal autonomy and families; b) incapacity; c) filial responsibility; d) vulnerability and e) generational justice. In many cases, the discussions have not been mounted as legal discussions *per se*, but as ethical ones.

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[92] *Frolik, supra* note 67, Chap 2. Intro. at 14.

[93] *Frolik, supra* note 75, Chap 3, Intro. at 18.

[94] In the past, guardianship could often be created if the person suffered 'from "the infirmities of old age". Wills written by the very old might easily be challenged on the claim that the testator lacked mental capacity to write a valid will.

[95] L.S. Whitton, "Ageism: paternalism and prejudice" in L. Frolik, ed., *Aging and the Law* (Philadelphia: Temple University Press, 1999) at 20.

### (a) Personal Autonomy and Families (Family Involvement in Decisions)

Marshall Kapp points out that gerontology, law, and ethics have recently begun struggling with the role of family in older adult's choices about their own lives. The prevailing contemporary legal and ethical opinions for relationships between patients and health care professionals operate in a civil liberties model with a view to avoid paternalism. It "tilt(s) strongly in favour of self determination, including the right to make bad decisions, to take foolish risks."[96] This approach has been criticized as ignoring the ongoing loving relationships, the connectedness, and the dependence of people, particularly when terminally ill.[97]

What model is appropriate for family participation in an older adult's decision making? It has been argued that in law, as in ethics, we need to focus on respecting an older adult's autonomy, not in the negative sense of "the right to be left alone", but in a positive, affirmative sense of autonomy as empowering an older adult to act and think. It has been suggested that family participation can act as an enhancer and contributor to an older person's autonomy. In support of that, it is pointed out that people live their lives embedded within various relationships. Kapp suggests that "Many older people welcome the opportunity to share what they perceive as a burden, not just the right of decision making. Contrary to the pure autonomy, some persons may not want to be empowered exclusively."[98] It is also felt that another reason an older person may be willing to share authority with family is to minimize family burden. By sharing decisions, the individual may intend to reduce feelings of tension or guilt that otherwise might bother a family.

The question arises whether we are considering this a legal and ethical model *only* for older adult decision-making, as opposed to *all* adults. Family involvement can be positive, negative or somewhere in between. It is recognized that family members may act, on their own or in cooperation with each other or professional caregivers, to preserve and enhance the older person's autonomy, or to override it. Family intervention ranges along the spectrum from assistance and support to persuasion and coercion.[99]

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[96] M.B. Kapp, "Who's the parent Here? The family's impact on the autonomy of older persons" Chap. 21, in L. Frolik, ed., *Aging and the Law* (Philadelphia: Temple University Press, 1999) 272-275.

[97] S.D. Watson, "When parents die: A response to Before Guardianship: Abuse of Patient Rights Behind Closed Doors" in L.A. Frolik, ed., *Aging and the Law* (Philadelphia: Temple University Press, 1999) 280-8.

[98] *Kapp, supra* note 96.

[99] *Ibid.*

It has been suggested in some quarters that lawyers should be thinking of the family unit as the client, as opposed the older adult. Adams and Morgan caution:

> *However, even family members who believe they are acting in the client's best interests are most likely acting in self-interest. They may be acting by financial issues or pure convenience.*[100]

The authors argue that broadening the concept of client to a family group could not only subject the older client to being treated with greater paternalism, but even pave the way to exploitation.[101]

### (b) Incapacity

As previously mentioned, older adults' potential mental incapability is given considerable mention in the legal literature. This affects how we view and judge older adults' relationships. Authors commonly discuss how illnesses and physical conditions such as Alzheimer's disease or other dementias can affect mental capability, temporarily, intermittently or permanently. Grieving and depression can affect the older adult's ability to make decisions and the ability to work with the lawyer. The grieving or depressed older adult may react very strongly (positively or negatively) to old relationships and to new ones, acting in ways that appear to be out of character.[102]

The authors note one should not make assumptions concerning older clients' abilities simply because the client has been diagnosed as having some mental condition.[103] "Labelling or classifying the client as mentally disabled can color perceptions, suggest reactions and predetermine results in interactions with clients."[104] In terms of personal relationships, the authors stress that an older client has the right to make choices that others (including the lawyer) think are not wise. While we recognize that younger clients may make unreasonable or eccentric choices, if the client is a person who is older, the same decision risks triggering someone petitioning the court for guardianship.[105] At the same time, there are situations where the older adult's mental capacity has deteriorated significantly, and that can affect whether or not the relationship is freely entered into, and whether the older adult can judge the kinds of risks that he or she is taking.

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[100] *Adams, supra*, note 84 at 15.

[101] *Ibid*, at 16.

[102] A. Mcdonald & M.E. Taylor, The Law and the Elderly (London: Sweet and Maxwell, 1995).

[103] *Adams, supra* note 84 at 9.

[104] *Ibid*. at 9.

[105] *Ibid*. at 20.

The second theme in the legal literature related to incapacity focuses on "If the client is incapable, how does the lawyer serve their interests." Adams and Morgan, for example, note that in the United States the Model Code on professional responsibilities provides very little guidance on how to represent the mentally disabled client. The same is the case in Canada. There is a failure to provide sufficient guidance on the methods of determining incapacity and what course of action should be followed once such a determination is made. Adams and Morgan point out that by failing to define incapacity, rules of professional conduct leave the lawyer to make a decision for which she or he has no qualifications and for which there is no given standard. A lawyer may not know the cause of the ostensible incapacity, that the confusion may not be static, or the different legal standards for capacity depending on the nature of the issue — executing a contract, manageing a bank account, or consenting to medical treatment.[106] This in turn affects the degree and types of support that the older adult may need from others to remain living independently.

### (c) Filial Responsibility (Financial Responsibility to Older Adults)

Although we might think of family law as covering all types of families, and families across the age span, family law literature has been almost exclusively focussed on the connection between parents and child under the age of majority. Those discussions focus on the child's support, well-being, and access for the non-custodial parent. After the age of majority, there is lacuna in any discussion of family relations within the law about relationships between parents and their now grown children. The general assumption is that children are now independent of their parents, and vice versa, with a few notable exceptions.

Occasionally, there is a discussion of "filial responsibility" in the literature. In each province in Canada, family law statutes will enumerate relationships setting out specific financial responsibilities and obligations and particularly financial responsibilities within families to ageing parents.[107] The obligations are typically justified on the basis of reciprocity (parents cared for them, now children should care for parents).[108]

Although seldom enforced, these laws represent an interesting example of the social expectation that families will provide for older adults if the needs arise and that the law should be used to enforce that moral obligation.[109] However, these are only minor issues in most seniors' lives, are used very infrequently, and are only one small part of the complex area of personal relationships. The law may become involved if there is apparent neglect of (often unstated) responsibilities by grown children to their parents.

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[106] *Ibid.* 18-19.

[107] For example, Family Relations Act, R.S.B.C. 1996, Chapter 128, s. 90.

[108] J. Blair, "'Honour thy father and mother' - but for how long? Adult children's duty to care for and protect elderly parents" (1996-97) 35 Journal of Family Law 765-82.

Although the filial responsibility laws have existed for decades, grown children were seldom prosecuted under these laws.[110] Parents could ill afford to take children to court. Suing meant jeopardizing existing assistance and other forms of support from the family. Seniors were often willing to starve rather than rely on family. From the mid 1940s, the laws were being pitted against other competing values, such as the privacy of the younger family and independence of the senior, to avoid reduction to dependent status on family.

These laws are typically criticized in the literature because the laws apply support obligations used for children (people under the age of majority) to adult relationships, ignoring the differences between the two types of relationships. Support to one's children was considered time-limited (e.g. 18 years), but support to parents could go on for decades. It was felt that the filial responsibility laws were damageing and psychologically harmful to the parent. "The older person who becomes dependent must not only cope with society's disapproval but also his own fear and disapproval of the dependent role."[111] Tension and stress in the relationship could result from this financial dependency of the parent on the child.

People also worried about detrimental collateral effects on the family: when economic support is required from offspring, it could perpetuate their own poverty in later life. The laws were also criticized for focussing only on one type of support to ageing parents – financial support – at the expense of other types given by family – affective and instrumental support. The laws also ignored the different kinds of support that older adults continue to give to the family.

Filial responsibility of children to their ageing parents has been reconsidered recently in both British Columbia and Ontario. In cases like *Newson* v.

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[109] The laws were seen as a way of reducing the responsibility of government to provide for aging people who were destitute and could not provide for themselves. Older adults rarely sued. Instead the state sued on their behalf or would use the legislation to justify reducing the amount of money that would be provided by the state to the older adult.

[110] J.G. Snell, *The Citizen's Wage: The State and the Elderly in Canada, 1900-1951* (Toronto: University of Toronto Press, 1996).

[111] F. Steel, "Financial obligations toward the elderly: filial responsibility laws" in M. Hughes & D. Pask, eds., *National Themes in Family Law* (Toronto: Carswell, 1988) 100 at 112.

*Newson,*[112] for example, courts have had to struggle with hard questions of "In what situations do ageing parents *deserve* the financial support of their children" and "What is the relative social responsibility between the state and family to provide support in later life?" The legislation also raises the spectre of ageing parents being judged after the fact and by different generational standards about the quality of care they gave their children.

### (d) Vulnerability

Older adults, like people of any age, can sometimes experience harm from people with whom they have a personal relationship. It is evident from the legal literature and the existing laws in many parts of Canada that we believe that growing older means becoming more susceptible to harms or exploitation from others. In most cases that harm is perpetrated by someone that the older adult knows well and trusts. (See Appendix B for further discussion on the relative vulnerability of older adults).

Article 48 of the Quebec Charter of Rights and Freedoms expressly recognizes older adults' right to protection. It notes: "Every aged person and every handicapped person has a right to protection against any form of exploitation. Such a person also has a right to protection and security that must be provided to him by his family or the persons acting in their stead."[113]

Across the country, Canadians have been struggling with who should be the source of the protection, how best to offer it and how best to help older adults who are experiencing violence or other types of harms from others. The Quebec Charter identifies the family, and others that act in the place of the family, as having a responsibility to safeguard the older adult.[114]

The Atlantic provinces place the responsibility with the state. During the 1980s, they enacted adult protection legislation geared to protecting older and other "vulnerable" adults. These laws allow a certain degree of state intervention, and can operate with or without mandatory reporting. Guardianship legislation often serves a similar type of purpose where the older adult is considered mentally incapable of protecting herself or himself.[115] Both adult protection and guardianship law in Canada has come under fire in the past for failing to adequately meet older adults' rights to due process, failing to meet their real needs, and establishing "remedies" that were sometimes worse than the presenting problem.[116] Several jurisdictions have been working to overcome these.[117]

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[112] *Newson* v. *Newson* [1998] B.C.J. No. 1736 (BCCA).

[113] *Charter of Rights and Freedoms of Quebec*, R.S.Q., c.C-12, Chapter IV, Economic and Social Rights, Article 48 states: « Toute personne âgée ou toute personnes handicappée a droit d'être protégée contre toute forme d'exploitation. » [Protection de la famille] « Toute personne a aussi droit à la protection et la sécurité que doivent lui apporter sa famille les personnes qui entienent lieu. »

[114] Does article 48 overlook the possibility that family, or others in their stead, might be the source of exploitation (and not a source of protection) in some cases?

Much of the rest of the country has taken a broader approach to harms that older adults can experience. It is treated as a state responsibility and a community responsibility. They integrate any assistance into the mainstream domestic violence responses, or into existing legal, social and health care services. This "more egalitarian" approach has not been without its detractors, particularly in light of the many barriers that older adults experience in being able to draw on these resources (See Chapter 5, Consultation, for a discussion of some of the legal barriers).

A prime example of older adults' perceived vulnerability also arises in common law under the doctrine of "undue influence". It permits an otherwise valid transaction (typically a will or contract, transfer of title to a house) to be overturned on the basis that it did not represent the person's intentions, but rather the intentions of the person doing the influencing.[118]

"Undue influence" is presumed in certain kinds of relationships and it must be shown that the person was susceptible in some way. Typically, this involves physical or mental decline. As a result, most alleged victims of undue influence are older. Gifts by elderly and infirm persons to near relatives on whom they are dependent for physical care and emotional support are among the most classic cases of undue influence.

"In part this reflects the poorer physical and mental conditions of older persons, and in part it represents prejudicial attitudes about the elderly that equate being older with being mentally frail and emotionally susceptible".[119] The susceptibility can be demonstrated by showing there was psychological or physical dependence upon the person doing the influencing (e.g., the ageing mother who was found to be susceptible when the son who lived with her played on her fear of being alone).[120]

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[115] R.M. Gordon, "Adult guardianship and adult protection legislation in Canada: recent reforms and future problems" (1995) 14(2) Canadian Journal on Aging 89-101; See also Manitoba Law Reform Commission, Discussion Paper on Elder Abuse and Adult Protection (Winnipeg: The Commission, May, 1998); D. Poirier, "Powers of social workers in the creation and application of elder protection statutory norms in New Brunswick and Nova Scotia" (1992) 4 (1/2) Journal of Elder Abuse and Neglect 113-133.

[116] *Ibid.*

[117] *Ibid.*

[118] L.A. Frolik, "The biological roots of the undue influence doctrine: What's love got to do with it?" (1996) 57 University of Pittsburgh L. R. 841-843.

[119] *Ibid.*

The doctrine of undue influence recognizes that persuasion, appeals to affection, ties of kindred or pity for future destitution, a sentiment of gratitude for past services are all legitimate actions of younger people on older people. Courts will note that acts of friendship are not necessarily acts of manipulation.[121] However, at a certain point, the person receiving the benefit has gone beyond merely persuading to unduly influencing the person (who is typically an older adult). Undue influence is not a distinct category of behaviour. Rather it is merely one end of the continuum, with people's altruism on one end and people's greed on the other.

The concept of "undue influence" was created in equity, as a way of redressing certain kinds of unfairness. Lawrence Frolik, a predominant writer on the law and ageing has seriously questioned whether, short of cults, there can be such a thing as "undue influence", whether one person can "influence another". Frolik suggests that with applying undue influence doctrine to wills, we are aiming for cultural and social norms that favour equal shares among our children. As a culture or society, we share the unarticulated belief that testators without spouses can be expected to leave their wealth to their lineal descendants.[122] When the testamentary pattern of a will violates the norm, people's eyebrows are raised.

Frolik's suggestion is intriguing because it represents the flipside stereotypic view of ageing within the law – that there are no differences whatsoever between older and younger adults. "Justice", in this view, is served by treating older adults exactly the same as younger adults, ignoring any potential differences in education, literacy, or dependence, isolation or infirmity. The challenge for the law and legal practice as it relates to ageing, is: "What are relevant differences for treating people differently? When are they relevant? and What makes those differences relevant in this situation?"

### (e) Generational Justice

The phrase "generational justice" encompasses two concepts. First, it describes the relative justice in the distribution of wealth and income between living generations, and more particularly what comprises justice between the young and the old. In a broad public policy sense, generational justice comes into question around income distribution in the form of old age security payments. The issue is often cited as raising serious issues of justice of transferring income from the young to the old. Or put another way, just how much can the old take before they do an injustice to the young? [123]

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[120] *Ibid.* at 852.

[121] *Ibid.* at 853.

[122] *Ibid.* at 877.

The second concept of generational justice is used to describe what the living owe those yet unborn, and what kind of legacy the living owe to their descendants:

> *While the living pollute the environment, use scarce natural resources or destroy natural beauty, they are diminishing the quality of life for those to come. If the living spend all they earn and leave no savings for their heirs, have they transgressed some moral obligation? (39)*[124]

The idea of "generational justice" tends to arise in social policy, the media, as well as family law and poverty law. Some use the idea when they question the fairness of older adults receiving benefits from government while other needy groups are perceived as receiving little or nothing. In a sense, the idea of generational justice, as commonly used, sets the stage for intergenerational conflict, pitting one generation against another. Within this rhetoric, rather than moving to improve the lot of all, one group wins and the other loses, or the reverse happens.

Under the umbrella of "generational justice," the older generation is treated as the creator of injustice. The idea is similar to popular writing that gerontologists refer to as "apocalyptic demography", the use of statistics to support questionable premises to arrive at unfounded or questionable conclusions about ageing in Canada, North America and the world.[125] While an extreme overstatement and simplification of the issue, the negative message behind it influences the law and social attitudes in many ways.

## C. Comparing the Two Literatures

Social sciences, and particularly gerontology, are increasingly recognizing the diversity of older adults' experiences: some older adults are living in good health and ageing successfully, others with more problems. The legal literature, in contrast, is strongly focussed on ageing and older adults in the context of disability and incapacity. It may be the law simply gets to see the more vulnerable members of the older population more often than healthy older adults in positive relationships.

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[123] See Chap. 6 Intro, " Generational Justice " in Frolik, ed., *Aging and the Law* (Philadelphia: Temple University Press, 1999) at 39.

[124] *Ibid.*

[125] E.g. D. Foot, *Boom, Bust and Echo : How to Profit from the Coming Demographic Shift* (Toronto: Macfarlane Walter and Ross, 1996). For a critique of this trend, see: Y. Carrière, "More than just a question of numbers" (Aug. 1999) 17(2) GRC News. 2-3. Online: <http://bibio.ucs.sfu.ca/gero/grcnews/grcn9808.html#Carriere>

Both gerontological literature and the legal literature continue to be influenced by stereotypic views of families as caring and giving support. These are important functions, but they represent only one side of the equation. Older adults also give to others. There can be dependence, but there can also be interdependence. The gerontological literature has not come to consensus on whether disengagement, activity or continuity theories best represent the older adult. The legal literature tends to surrender to a disengagement perspective, where it is "right" for older adults to be less involved and "right" for others to take over.

# CHAPTER IV

*Morality or Ethics is primarily to the Individual, what Law is to Society.*

~ Giroux, 1991 ~

# Canadian Social Values

Law and ethics (particularly ethics in the sense of values) are interdependent. Several legal schools of thought implicitly or explicitly recognize that laws and "the law" emerge from a social and cultural context.[126] The law, its interpretation, and its operation are a reflection of strong and dominant values within a particular society. In order to have a better understanding of the law and its potential and current role in older adults' relationships in Canada, it is important to examine some of those values. The central question is: What are the main Canadian social values?

It is extremely challenging to try to describe a society through its dominant values from a social or psycho-social point of view, instead of from a personal or individual perspective. As a result, we are looking at the values promoted as the strength of the social fabric in Canada. We borrow from social values that have already been expressly stated in Canada, and we interpret them in the context of older adults' lives.

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[126] Michel Viley, *Leçons d'histoire de la philosophie du droit* (Paris: Dalloz, 1957). For example states that law is directly related to values, but that we can discuss the goal of the law as being a quest for what is just, as an observation of the social facts, or as a technique of social control.

## A. The Charter as Embodying Some of Our Social Values

Two important social values emerge in the Canadian Constitution:[127] democracy and sharing of power (confederation). Others emerge from the *Canadian Charter of Rights and Freedoms* in the 1982 Constitution as a guarantee to all citizens. These include, but are not limited to, fundamental freedoms, such as freedom of religion, freedom of belief and freedom of expression, legal rights, and the rights of all individuals to equality before and under the law.[128] The *Canadian Charter of Rights and Freedoms* has been a significant tool to help society define its priorities and the boundaries between social and individual rights. Underlying these rights are ideas about fairness (substantive and procedural) and non-discrimination (recognizing relevant differences and not acting on irrelevant ones). The rights of the individual have reasonable limits, consistent with the values of a free and democratic society. Canadian society strives to achieve a balance between individual rights and collective rights and ensure that both are respected in the end.

In the background to these rights is the idea that all human beings are equal in worth and dignity and that they are entitled to equal protection of the law. These public statements of values, as well as those stated in provincial human rights legislation, underscore that "respect for the dignity of the human being and recognition of their rights and freedoms constitutes the foundation of justice and peace."[129] As the preamble to the Quebec Charter points out, "The rights and freedoms of the human person are inseparable from the rights and freedoms of others and from the common well-being". In the context of older adults, this may be stated as "how we treat older adults reflects upon us all".

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[127] We chose this as one of our markers because it is the official document describing Canada.

[128] Similar rights are expressed in provincial legislation. While the Canadian Charter of Rights and Freedom governs the relationship of federal government and government bodies and agencies vis à vis the individual, provincial human rights legislation governs the provincial government, industry, and to some extent, individual conduct towards the people of the province. The legislation on human rights, with the notable exception of Quebec, does not cover personal relationships. Instead, it typically covers more public relationships -- employment, tenancy, and provision of services ordinarily available to the public. Both federal and provincial legislation across the country express many different social values. Provinces differ widely on how those values are integrated (or not integrated) into government and business dealings with older adults, and with older adults' relationships with others.

[129] See for example, Ontário's *Human Rights Code* R.S.O., 1990, Chapter H.19 and Alberta's *Human Rights, Citizenship And Multiculturalism Act* 1980, Chapter H-11.7. The Preamble to the Ontario Code states " The purpose is to create a climate of understanding and mutual respect for the dignity and worth of each person so that each person feels a part of the community and able to contribute fully to the development and well-being of the community and the Province."

## B. Applying these Values to the Social Reality of Older Adults

Each of the stated rights and freedoms can be applied to the reality of older adults as individuals and as a group. In many instances, there are fundamental differences between what we espouse as a society and how we conduct ourselves towards older adults in our laws and our practice. We have selected a few issues arising for older adults, and where applicable, note their influence on relationships.

Freedom of religion and freedom of belief are important to many older adults who have a spiritual life. As will be shown in the *Sawatzky* case in Chapter 7, an older adult's personal freedom of religion can run into conflict with medical practitioners whose personal or medical values can be fundamentally different. In the community, the right to practice a religion is rarely challenged. However, it can become an issue for older adults residing in long term care facilities where religious practices are not always offered or where only one or two dominant religions are offered and the others denied. In private institutions, a religious practice can also be imposed on the residents.

One's religion can be not only a dialogue with a higher power, but also a communion with others of the same faith. That sharing of faith, belief, and history among people can be important to older adults who adhere to a particular religion or to a particular group or community. To be deprived of it is to deny an important relationship between older adults and others.

Our recognition of freedom of belief, freedom of expression, and freedom of association is based, in part, on an overarching belief in the right to control our own lives in fundamental ways. For an older adult, when so many other parts of life seem to be taken out of his or her control, the areas that remain become even more cherished.

The right to take up residence and work anywhere in Canada is important for all Canadians. The issue of work is becoming an issue for more and more older adults. Many fields of work encourage or force older adults to retire at 65. There is often an assumption that beyond a certain age, a person is less productive, and that we need to make space for the younger workers. However, the legal debate on age in Charter of Rights cases thus far have been limited to university professors and other professionals in higher education questioning mandatory retirement policies. Cases like *Dickason* v. *University of Alberta,*[130] *McKinney* v. *University of Guelph* or *Douglas/Kwantlen Faculty Assn.* v. *Douglas College* remind us of the general confusion between (and tendency to link) competency and age. The discussion has not taken place in the context of displaced workers, older women living in poverty, or other pressing issues facing older adults.[131] Forced retirement also often means a significant loss of relationships with those at work.

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[130] *Dickason* v. *University of Alberta*, [1992] 2 S.C.R. 1103; *Douglas/Kwantlen Faculty Assn.* v. *Douglas College*, [1990] 3 S.C.R. 570; *McKinney* v. *University of Guelph*, [1990] 3 S.C.R. 229

Ostensibly, the legal rights are the same for all Canadians. There is evidence to suggest that, in practice, older adults receive significantly different treatment with respect to their rights to equality before and under the law. Older adults are the most common recipients of guardianship orders and adult protective services. They are also among the most likely to formally and informally have their mental competency questioned by professionals and service providers. Yet, they often do not receive the fundamental protections of the law that other adults would receive, such as the right to be informed that they may lose their liberty to make their own choices about where they live and with whom, and the right to legal representation. Due process for older adults in these situations can often be superficial or non-existent.

The Canadian Charter and provincial legislation prohibit discrimination on the basis of several categories, including age. However, in at least three provinces in Canada that "inherent right" stops at age 65[132] because their provincial human rights legislation only covers people from the age of majority to 64. Older adults can experience discrimination in many ways. Allocation of scarce resources, such as pacemakers, is always a difficult task. However, older adults can find themselves less likely to be considered for these resources, based solely on their age. Older adults can experience discrimination in housing. Even if age is not an official reason for refusing tenancy, a landlord can decline an older adult with no reason or find ways to expel tenants who have simply grown old there, using non-official arguments that older adults are *likely to be* less capable of keeping the apartment in a good condition or that they *might* set a fire by accident, etc.

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[131] Klassen, T.R. and Gillin, C.T. "The heavy hand of the law: the Canadian Supreme Court and mandatory retirement" (Sum. 1999) 18(2) Canadian Journal on Aging 259-276.

[132] For example, Alberta defines "age" as 18 and over, but does not provide protection from discrimination on the basis of age where tenancy and accommodation is at issue (one of the most important areas for many older adults). Both B.C. and Ontario expressly prohibit discrimination based on age. However, in B.C. "age" does not cover those aged 65 and over. In Ontario, those over 65 are not afforded protection from discrimination in employment. These noticeable omissions have important consequences for the older adults, not only in their dealings with government and services, but also the way they are viewed within society. By being afforded less protection than others under the legislation, it also affects their day to day relationships with others, e.g. directly with building managers and indirectly with others. Not all provinces take this direction. Quebec notes that "every person has a right to full and equal recognition and exercise of his human rights and freedoms, without distinction, exclusion or preference." It prohibits discrimination on the basis of age (any age).

It is also important to recognize that even where provincial rights legislation covers older adults, they are far less likely to approach human rights boards or tribunals to demand or enforce their rights. Even a rudimentary review of human rights cases shows that few if any cases being brought to their attention involve older adults. Having been raised in generations where the focus has been on "responsibility" and "duty", the concept of demanding rights is alien to many older adults. Groups representing older adults have also been noticeably absent as litigants or intervenors in Canadian Charter of Rights cases.

Non-discrimination is typically described in human rights principles as a recognition of the inherent dignity and worth of each person. Valuing each person is an end in itself, but it is also recognized in our laws as a means to other ends -- for example, "as the foundation of freedom, justice and peace in the world". To borrow from George Orwell in his novel *The Animal Farm*: All animals are equal, but some are more equal than others! Could we ask the same question for adults: Are younger adults more equal than older ones?

## C. Social Priorities as Identified by Justice Canada

As a society, we have been establishing and refining priorities in law, recognizing that in the past some key groups' interests have not been as well served by Canadian justice. Justice Canada points to groups needing specific attention and whose needs and interests we will need to promote and protect better in the future. One of these that Justice Canada has identified is family. Interestingly, Justice Canada focusses on spousal relationships paying particular attention to families with minor children. Older adults are not mentioned within the text as a family unit themselves nor within families. So the questions arise: Are older adults still part of the Canadian family? Are they excluded? If so, why?

Justice Canada also places a focus on certain identifiable groups such as youth, women, Aboriginal people, etc. Once again, older adults are not identified as a specific group. Is it because we believe that their major needs are already respected? Or is it that we tend to overlook that they too can have specific needs that are not being considered and addressed?

Justice Canada notes that we live in a changing society:

> *Our legal system provides a unique and valuable framework for Canadian society. It is based on the rule of law, on freedom under the law, on democratic principles and respect for others. Our tradition of law and justice is an important heritage for every Canadian. As society changes, we must make sure that this tradition will meet the challenges of the*

> *future…. We live in a world where change is taken for granted…. People are changing their attitudes towards many things and towards society itself…. As people change the way they live and work, the assumptions on which our legal system is based may have to change.*[133]

Older adults need to be considered as part of this changing society.

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[133] Justice Canada, "The Future of Law in Canada" Online: <http://canada.justice.gc.ca/en/dept/pub/just/CSJ_page37.html>

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# CHAPTER V

*La revendication de justice aboutit à l'injustice si elle n'est pas fondée d'abord sur une justification éthique de la justice.*[*]

~ Albert Camus ~

## Consultation

In order to better understand the ways in which the Canadian legal system is potentially involved in older adults' lives and their personal relationships, we interviewed eleven key individuals across Canada who:

- work closely with older adults and see the ways that the laws have an impact on the adults' lives; or
- teach and conduct research in areas of law or ethics that can have an impact on older adults' lives.

In bringing together these different perspectives on the law and older adults' personal relationships, we have two bodies of knowledge and experience (legal and ageing) that have tended to operate separately from each other. The questions posed to the respondents focussed on six main areas:

1) What they considered as older adults' personal relationships;
2) How older adults are viewed in our society;
3) How they are characterized in the law;
4) How older adults are treated by the legal system;
5) Areas of law where older adults' personal relationships are more susceptible to arise; and
6) How to make the system more responsive.

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[*] "The demand for justice leads to injustice if it is not initially based on an ethical justification of justice." [Translation]

Our main goal was to capture a critical point of view of the law, based on an analysis of the spirit of the law, its capacities, its limits and the way it is applied. In this way, we hoped to have a better understanding of the areas of law where older adults' personal relationships can apply or be debated.

The respondents surveyed covered broadly all the issues that we suggested. A large proportion of their ideas were helpful to us in choosing particular directions and building discussion throughout this report. Their insights were particularly rich in suggesting the areas of law where older adults' personal relationships are the most likely to be treated and they provided strong comments on positive and negative areas of the law. In order to avoid repetition in content, this chapter focuses on issues either not covered or only covered briefly in the other sections of this report.[134]

## A. Defining Older Adults' Personal Relationships

The human being is a social animal and the person's life is played out in interaction with others. As a result, we might anticipate that "personal relationships" would be a central concept in law, not only in areas that apply to older adults but for all ages. We asked our respondents, what immediately came to mind when we use the term "older adults' personal relationships". Several people drew a distinction between what their immediate ("reflex") reaction was and what a more reflective response would include.

Reflex responses to the term tend to reflect social conventions and focus on family. The commonly viewed "definition" of "family" as it relates to older adults tends to begin with spouse, then expands to the older adult's children (and their partners) and grandchildren. Respondents stressed that close friends and other people that the older adult considers as significant had an essential role in many older adults' personal relationships, and should be included in the concept:

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[134] From the beginning, several of our respondents pointed out that discussing older adult's personal relationships within a legal context was a new way of framing issues for them. Legal respondents tended to be more familiar with specific areas of laws or professionals' (e.g. service providers) involvement in older adults' lives and the legal implications of that involvement. Our community respondents have had the opportunity to view older adults, the wealth of their relationships with others, and older adults' contributions to society. Their experience is based on psychosocial practice and less on legal practice. In their experience, healthy and mentally capable older adults' involvement in or connection to the law tends to be very limited. The community respondents saw the legal issues or the problem areas as tending to arise in a broader context of ageism, or where the older adult's mental capability was deteriorating or fluctuating.

Respondents were quick to point out that their understanding of older adults could not help but reflect their own personal ideas about growing older and aging. The legal respondents also cautioned us that their ideas tended to reflect matters they felt were interesting in their field of law, as opposed to legal issues that older adults felt were most pressing in their lives.

> *I tend to think more of family, but then there is the definition of who is 'family'. Among older adults, peer groups and cohorts are strong. Often, family are not living nearby. I think of the phrase in terms of others who share in their personal information -- so the definition needs to be fairly broad...*

There are two different views of the role of close friends and significant others. In some cases close friends are seen as "filling in the gap" where there is no living family, where family members live far away, or where there are family tensions. A different view sees these close relationships, not as a fall back position, but as an integral role. These are chosen relationships.

Family and others, for any variety of reasons, have far less involvement in the older adult's life. As one respondent noted:

> *'Family' is not what it used to be. Many older adults have more meaningful relationships with people other than their immediate family. Those relationships tend to be deeper -- they share their pain, suffering, vulnerabilities.... These are the personal relationships for many older adults that could be closest....*

As another respondent notes:

> *We tend to think of neat family boxes -- functional boxes such as parent-adult children. In the past, the focus has been: What are the norms? However, we need to recognize that the world has changed. We need to consider how to define 'relation'. Who constitutes 'close' and who constitutes 'family'? 'Close' is not sex based. It can just as easily be two sisters or two friends who live together, or the neighbour downstairs – where they keep an eye out for each other. We need to consider dependence and closeness and support during life. They are the ones that maintain contact during crisis.*

Close friends, deep family relations, and other significant persons are often people with whom the older adult has discussed her wishes, her needs, what she would like to have happen if she became temporarily or permanently incapable of administering her life:

> *I think of it (a personal relationship) in terms of who they talk to (share their wishes, their strongest beliefs) on things like how they would like to handle their legal matters, living wills, financial decisions.... It is matters*

> *like discussing where they might need to live… matters affecting independence and when they need more supports….*

Relationships operate on many different levels:

> *It is important to recognize sometimes that older adults have relationships with others that don't necessarily know them well, but these are the ones they feel safest with. Family relationships, in contrast, carry responsibilities and baggage….*
>
> *But in these relationships with others, the senior likes that the conversation is kept superficial -- there are parameters around that relationship -- the senior has some control over how far it goes… The other relationships with family carry risks, or responsibilities, or expectations with it.*

The main characteristics of a positive personal relationship, whether with family or others, can be summarised as intimacy, trust, and strength of the tie. In some cases, this person has helped the older adult make decisions in the past and has helped the older adult in other ways such as accessing information or resources so that the older adult can make her own choices. The older adult values and trusts this person to help or assist in other important matters, such as the choice of a living environment or a care facility if his or her health fails.

A number of respondents pointed out that the concept of older adults' personal relationships could include a number of situations that we might not immediately consider as "personal". For example, their relationships with landlords in apartment buildings or staff in care facilities tend to be seen by the law as contractual relationships, not as personal relationships. From the perspective of the older adult, they can be much more because it often involves continued contact on a daily basis and a certain degree of familiarity and intimacy.

One of the respondents points out that in several provinces, the legislative drafters have developed lists of who is considered as having a relationship and who has a right to speak on another's behalf. These are "consanguinity tables", based on a combination of autonomy and best interest. It has been suggested that the consanguinity tables exist for the convenience of the health care providers. *"It tells them who they must listen to when they accede to decision by the family."* Consanguinity tables are based on the assumption that nobody knows a wife better than her husband, or vice versa, or her children etc.

> *The assumption is based on the nuclear family as we know it. However, in many instances family is not taking care of the elderly -- they aren't geographically available, and sometimes they simply do not want to do it or are not involved in the seniors lives in any real way.*

Thus, in contrast to an open-ended approach to relationships, law often comes to the person with a particular relationship in mind, one that is externally imposed.

## B. How Older Adults Are Viewed In Our Society

In our democratic society recognised for its rights and liberties, older adults are often the target of numerous prejudgments (prejudices) and discriminations. As one respondent notes:

> *While many seniors are highly respected, there is an undercurrent of ageism [in our society]. When people hear the term "senior", they tend to think of frail, non-contributing.... If a policeman sees seniors driving slowly -- they have to go for a retest. Or doctors don't listen to what you are explaining to them, saying "It's just old age, what can you expect at your age." ... People (in later life) tend to get treated differently in many systems than if they are 40.*

The comments from others reinforce this:

> *For the seniors, [being treated differently] is a matter of being old, plus other factors such as disability.*
>
> *[For seniors] discrimination is not an additive effect, it is an exponential effect!*

These prejudgments or prejudices reflect perceptions that older adults are incapable of understanding things, incapable of making “reasonable” decisions, and incapable of being integrated into society, etc. As another respondent notes:

> *Older people tend to be socially objectified and treated as a commodity long before they are dead.*

Respondents gave several examples of the patent and latent ways in which we carve out older adults from the rest of society. Age discrimination is the most obvious example. Mandatory retirement was another clear example. On this issue, one of our respondents stated that the judges are in a poor position to be objective on mandatory retirement: they can work until they reach 75 years old! Their comments raised an important question for us: If society does not feel that the older adult are capable enough to work to past the age 65, are we giving a message that we feel older adults are not capable of playing other active social roles within our society?

Respondents do not see most Canadian laws as being inherently unfair to older adults. Indeed, they point out many areas where the laws have gradually become more responsive to older adults' needs and interests. Social benefits (e.g. Old Age Security, rent subsidies) for older adults were lauded by people, with some remembering how much poverty there has been among older adults throughout most of this century.

> *[These] have allowed older people to live a reasonably dignified life... The senior is reasonably secure, as long as she or he does not have a lot of other problems.*

However, some noted that the way society has accomplished this feat has not come without a price to seniors:

> *[We need to remember] there are all the things that seniors aren't eligible for — we've set up a system separate for them -- which has been instrumental to many to avoid poverty… but the system itself separates out seniors from the rest of adults; it becomes a justification for treating them differently.*

Some pointed out that we have not adequately met the needs of other people in poverty, younger people, particularly younger women with children or adults who were facing unemployment, under-employment, and poverty in the 45-64 age group.

Respondents differed on whether adult protection (special legislation aimed at primarily older adults) was positive or negative. Most felt it opened up the opportunity for paternalism. Among the positive measures, people pointed out that some provinces have specific measures, such as “mandat en cas d'inaptitude” in Quebec, that go beyond simply health or financial matters to include any type of decision-making and any part of the older adult's life with which she or he might need assistance and support. In recent years, provinces have been adding legal protections to reassess whether or not an adult is still incapable. In doing so, the older adult is not caught in a role where everything is decided for her until the end of her life.

## C. How the Law is Applied

Law contains relatively few dispositions directly related to (or aimed at) ageing or older adults. The laws impinging on retirement and pension issues are a notable exception. However, there are several areas of law, typically in the area of health-related laws, which respondents have found to be problematic in the way that they characterize and respond to older adults. These typically revolve around capacity, consent, and substitute decision-making.

There is a tendency to define and view older adults as ill, weakened by numerous losses of physical, psychological and social capacity, and detached from the social reality. In some cases, those prejudgments become ossified in practice:

> *In our province, the [long term care legislation] clearly discriminates against the senior. It assumes that seniors in care are not capable—of taking their own pills, of doing things for self… It builds in and reinforces helplessness …. The regulatory bodies focus on 100% compliance with the regulations. This is a systems requirement. It does not make the staff more capable or the seniors happier. In paying attention to the letter of the law, and not the spirit of the law, they ignore the diversity of seniors in care. As a result, administrations do not like it if you talk about cohorts, individuality and differences. The focus is on treating everyone the same.*

In some cases the issues are not so much with the letter of the law, but its application and its interpretation:

> *The law is also affected by the administrator -- those who are applying what they think the law is ….*

For example, respondents have noted increasing pressure being placed on older adults going into institutional care to sign advance directives. A legal instrument intended to give adults choice becomes used to force choices on substitute decision-making on them. In many cases, there is no explanation that they are designating a person that will decide on their behalf and no explanation of the importance of that decision. The law, in its spirit, is not respected in practice.

In a poignant example, one respondent notes that it is often hard to have an older adult's life respected and to be respected as an older adult:

> *An older woman was talking to me about her mother who had been on a respirator in a care unit. The attending doctor wanted to take her mother off the respirator. That would mean she would die. The woman stayed by her mother's bed 24 hours a day to make sure the respirator was not*

> *turned off. As she was describing the event, I was impressed by her medical knowledge, and asked her whether she was a nurse. 'No,' she explained, 'I am a doctor.'*

Capability assessments are seen as another problem area:

> *In assessing a person's capacity, the assessors are testing for what they are concerned with, not what she (the person being assessed) is concerned with. ... The assessors and the people making the law do not know who its subject is....*

Protection laws in the area of mental health are often based on an assumption of global incompetence that does not include variations in competence over time and does not include degrees of self-management in areas where the person remains competent.

## D. How the Legal System Treats Older Adults

At present, few cases directly involving older adults go through the legal system and are dealt with in the courts. When older adults address relationship or other potentially legal problems that they are facing, the case is often concluded without official procedures. In some instances, this occurs because the older adult prefers to deal with the matter outside of a legal framework. The system appears too adversarial for their needs. In other instances, it occurs because the older adult is shut out of the legal system, subtly or not so subtly.

> *I've noticed that law as it 'serves seniors' is again putting them in a subservient role--it is an 'us' and 'them' kind of thing. ... There is the jargon of the law--I think that the law is paternalistic -- the law acts as the parent. There is a lot of patronizing, authoritarian ideas within the law....*

Both community and legal respondents note that there are many barriers to justice for older adults, as well as many forms of latent or patent prejudice they can encounter within the justice system. These in turn can affect how their relationships are understood, and whether or not they are protected from destructive relationships. The common legal issues for older adults revolve around:

1) access to information;
2) access to resources;
3) the need for legal assistance;
4) response to their welfare;
5) their familiarity and comfort with the legal systems;
6) responsiveness of the justice system; and
7) inherent biases in the system.

### 1. Access to Information

In most cases older adults are not aware that they have certain legal rights in their relationships with family, professionals or government, or how they can enforce those rights. This lack of information became pivotal because family members sometimes saw themselves as "above the law". In other words, while they would certainly feel they had a contract or a responsibility if they were dealing with anyone else, because this was their mother or father the rules did not apply.

It was pointed out that lawyers and notaries often do not create a setting where an older adult can speak freely – e.g. drawing up a power of attorney was treated as a routine matter without regard to its potential impact on the older adult's life. The normal privacy standards that would be expected for younger clients often were not there -- to speak separately, respecting confidentiality, older adult's rights to information, and their rights to freedom of choice.

Older adults often made wills or property transactions without understanding or without lawyers explaining. In some instances, there could be considerable confusion, with adult children tricking the older adult into signing, e.g. by lining up all the documents to sign.

Older adults typically do not know what legal or other agencies can assist them in working through problems and legal matters. The difficulty begins with a lack of public information available in ways that older adults can understand and use. Literacy has a significant impact for many older adults. It not only leaves them vulnerable to exploitation or other types of harms, it increases the likelihood that they will not be aware of their rights, or available remedies and resources.

### 2. Access to Resources

Other older adults often have difficulty accessing information and resources that are available:

> *Technology can act as barriers for older adults trying to resolve situations on their own or with the help of the legal system. Phone systems, such as voice mail, where you push #1, push #2, makes it hard for seniors to get through and many just give up.*

Part of the ability to access resources depends on how skilfully the person can describe his or her problem and negotiate the system. For older adults, it is often a major hurdle to be able to explain the problem to the receptionist who controls who gets an appointment with a lawyer or other legal advisor in the first place.

Community respondents note the presenting problem often masks more serious issues.

> *Law comes with a set of pre-established categories that people have to fit themselves into… You don't have a remedy unless there is a right identified in law….*

If the older adult fails at the outset to describe a type of legal problem or issue that the agency deals with, he or she is simply informed "Sorry we can't help." As a result, they struggle on their own.

### 3. Legal Assistance

Income affects older adults' access to justice. Older adults often do not have sufficient income to hire a private lawyer and they are slightly above the financial eligibility criteria for legal aid. Many of the legal problems involving relationships or otherwise that older adults encounter are not covered by legal aid. In effect, they are denied access to law.

In some instances, an older adult's precarious financial circumstances have been caused by the financial exploitation of others. It can be extremely expensive to try to recover what the perpetrator has taken away. As one respondent commented:

> *I remember in the White Rock case — the lawyer said it would cost $30,000 to pursue the case.*

With few financial resources left and not overly optimistic chances of getting a successful judgment, the older adult often forgoes the existing legal remedies that might be available.

### 4. Response to their Welfare

As people age, legal attitudes and responses to their needs and welfare become quite different. This different treatment takes many forms:

> *As you age, people tend to think of you as unfocussed, scatterbrained, confused. You are considered not a good witness because you may forget or your chronological order may be off.*

As a result, older adults' queries or complaints to police, financial institutions, or administrative authorities may not be taken seriously:

> *I think the cops are terrific—but some think that old folks are not capable. There is an ageist attitude that pervades the law system.*

> *I've noticed that financial abuse may not always be investigated. The issue is fuzzy and consent is fuzzy. It seems as if the person consented to it ... but you need to dig deeper.*

Respondents note that actions taken by legal authorities can be different if one is old. While the law is clear that striking someone is an assault, the police may be reluctant to lay charges if a family member assaults an older adult. Or, the police may not know where to put the victim if he or she is unsafe. Shelters available to younger victims tend to be ill-suited for older adults. In some cases, if the police remove the abuser, it may leave the victim in a vulnerable position, with no one to care for him or her.

### 5. Familiarity and Ease with the Justice System

Respondents note that courts and the justice system are very confusing and intimidating for seniors:

> *Going to court is not a pleasant experience* for anyone. *But for seniors it evokes a lot of fear, particularly if the person is not feeling well or is in poor health.*

There are many reasons for the lack of ease:

> *In many instances, seniors distrust lawyers. ... Seniors fear those with more education than they have, and lawyers speak a very different language that they do not understand....*

Today's younger generation has had far more exposure to the legal system than the older generation. In many instances the younger generation has been taught about it in school. In contrast, most seniors have made it successfully into their senior years with no contact with lawyers (except perhaps to sign mortgage papers 40 years ago) or any part of the legal system. Their knowledge of the legal system instead often comes from information in the press or on television, which may be skewed or simply inaccurate.

Respondents note the need to help overcome the senior's unfamiliarity, and unease with the justice system:

> *There is a strong need for advocacy to see people (seniors) through that system to explain the process and go with them... let them know the procedure and what their options may be.*

## 6. Responsiveness of the Justice System

There is a strong feeling among respondents that judges and other parties in the system do not understand seniors, their values, needs and priorities. However, one respondent also noted:

> *There are a lot of* assumptions out *there right now – e.g. that because you are old, you can't wait for court ...* *assumptions* *that as a senior you won't testify, that judges won't believe you, and that you won't leave the relationship. Certainly we need to expedite the cases – but not exclude seniors. We are setting up the expectation that seniors won't use courts, and then doing everything in our power to see that the expectation holds true.*

Even when successfully in the system, older adults often experience delays and are shifted from one office to another. As a result, they feel demeaned and do not feel respected in the process:

> *They (older adults) tend to be marginalized in the game.*

One respondent also suggests that most lawyers "do not do the soft side of law". That is, they fail to appreciate the value base of laws and tend not to understand the normative capacity of what they do. This, in turn, affects the advice they give. For example:

> *The hospital gets certain kinds of advice from lawyers, and that affects their response to older patients. The lawyers are taken as authoritative. Information presented to their institutional clients tends to focus on how to avoid trouble. This leads them to act in conservative and mechanistic ways that often do not meet older adults' needs.*

## 7. Inherent Biases in the System

Damage awards in court are based on assumptions that people are "productive members of society" who contribute to society through their labour. The economic analysis used in damages is very age-sensitive, and seniors are at a disadvantage to have their losses adequately recognized in this system. As one respondent notes:

> *We currently have considerable difficulty quantifying and attaching a monetary value to matters such as a senior's loss of dignity, self-respect, fearfulness, anxiety, or loss of self worth….*

These are harms that can result when personal relationships become abusive or exploitative. [135]

## E. Areas of Law where Older Adults' Personal Relationships Are more Susceptible to Arise

Issues regarding older adults can be dealt in with many different areas of the law:

> *The law focuses on financial matters, property, wills, power of attorney because seniors are statistically closer to disability and death. Also, they have acquired assets -- and others are concerned about what is to happen to those assets….*

Any benefit that a senior receives (or as worded by one "welfare for seniors") leads to potential public scrutiny of his or her life, including relationships.

For a majority of the respondents, law becomes interested or involved in older adults' personal relationships only in cases of conflict or lack of consensus. These might arise between the older adult and the other person (marriage, divorce, contractual arrangements), where a family member, an authority, or other interested party is scrutinizing the older adult's relationship and the decisions he or she is making with respect to that relationship (wills, contracts, elder abuse) or where an authority and a substitute decision-maker differ over what the older adult needs or would want.

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[135] According to L. Kimsey, "Abuse of the elderly: the hidden agenda. II Future research and remediation" (1981) 29 (11) Journal of the American Geriatrics Society 503-507, in a traditional court analysis, damages are limited to 1) pain and suffering; 2) medical expenses; 3) loss of earnings; and 4) loss of prospective economic benefits such as future earnings or savings. For most seniors, two of the four "measures" of damages are virtually meaningless because they have no income other than their Old Age Security and no expectation of future earnings. The amount for pain and suffering may be limited or unavailable depending on the extent to which the senior was aware of his condition. So there has been a tendency to award little or nothing if the person is unconscious or is not aware of his surroundings (e.g., as might be the case for an abused senior with dementia). For example, in *Lindal* v. *Lindal*, [1981] 2 S.C.R. 629, the judge suggested, although he did not decide the point, that a permanently unconscious plaintiff might be entitled to no moral damages. As a result, the quantum of damages in civil cases tends to be much lower for older adults.

## F. Making the System More Responsive

As a society, there is a need for change to have more welcoming or receptive services for older adults, to create areas where they can go and discuss their problems without being captured in a system that they do not clearly understand. Some respondents propose the creation of alternative tribunals and similar measures to the ones in familial mediation and in divorce. There is also the emergence of a need for restorative justice instead of punitive justice.

Others were cautious about jumping into some forms of alternative justice, noting that there can be important power imbalances that need to be recognized and resolved first:

> *In an alternative justice model the surfacing act often does not reflect all the violence below. For example, this one trespassing incident that brought the case to court does not reflect the 20 times he did it before the senior got the courage to call in the police. In a mediation, the mediator says 'Oh come on, let him visit on Sundays'. [So the woman relents.] But the mother finally said, "Stay away from me." You have to look at the context. The emotional and social context of seniors and their generation.*
>
> *Most people, including seniors, want limits / boundaries to their relationships with others (I'll do this for you, but not that)... but seniors may not have the personal resources to set those limits... . Seniors tend to get pushed into doing things....*

Educating people in the justice system about ageing and diversity among older adults was seen as very important to several respondents to overcome existing barriers. However, it was just as important to work with those who apply and interpret the laws (administrators, social workers, health care professionals) affecting older adults' lives, to overcome ageist and mechanistic views of what the law was trying to accomplish.

Some of the problems that people have identified exist because older adults are not currently involved in the design of laws that affect their lives. In order to make the legal system more responsive to older adults, one respondent suggests:

> *I think that in any law reform, we need to have forums involving seniors to see how they feel about these changes. Our tendency has been for professionals or law makers to mull it over and not consult those it (the proposed law) affects. ... I'd like to see a concerted effort in law reform to involve seniors on those boards and committees.*

There is a need to create and foster older adult groups that will advocate for themselves. Finally, the *Canadian Charter of Rights and Freedoms* was seen as another way of re-examining our current approaches to older adults:

> *I'd love to see people go through the Charter and start challenging: Are the needs and rights of older adults covered off in the Charter? Look at laws and policies across the country and bring them in line with the Charter — to make them meet at least the minimum standards of respecting people's freedoms and liberties.*

# CHAPTER VI

*If you associate enough with older people who do enjoy their lives, who are not stored away in any golden ghettos, you will gain a sense of continuity and of the possibility for a full life.*

~ Margaret Mead ~

# Areas of the Law Affecting Relationships

This chapter briefly describes several areas where the law has been involved in older adults' personal relationships to some extent, and how they potentially affect those relationships.

Relatively few areas of the law or legal literature directly address the personal relationships of older adults in the sense of making express statements that "this is a relationship" or "this is not a relationship". However, the relationships, and often unstated and untested assumptions about the relationships, can become an issue in certain areas of the law. This arises primarily in substitute decision-making (health care decisions), economic matters, criminal matters, adult protection, and guardianship. In each case, the law tends to only be involved in older adults' personal relationships in these areas where there is conflict or crisis.

Some laws are involved in older adults' relationships in a tangential manner. For example, housing standards and building codes and municipal by-laws can facilitate or impede certain kinds of living arrangements between older adults and others. Tax laws primarily focus on generating revenue for governments from their citizens. However, at a policy level, tax laws can reflect ways of encourageing or discourageing different kinds of behaviour and promote certain kinds of personal relationships by giving tax exemptions or capping life time capital gain exemptions.[136] Other laws affect older adults' relationships much more directly.

## A. Contract Law (Economic Matters)

Contract law is based on the idea of people being free and equal agents. It focuses on individual freedom, and individual responsibility to make any deal or bargain that the person sees fit. Contract law affects an older adult's personal relationship most strongly when an older adult is attempting to exchange something of value (e.g., title to his or her house) with adult children or others, in exchange for ongoing care and accommodation in the future. The primary issue for older adults has been that these "freely entered into exchanges" have been almost impossible to enforce in law.[137] As a result, the older adult loses his or her most valuable asset and resource, and does not receive the care bargained for. When children or others renege on these agreements, it often means an important loss of resources for the older adult and in some cases, increased risk of institutional placement. It also means an important loss of trust between the parties.

Contract law, for the most part, allows a fair amount of latitude and freedom to contract as one wants.[138] Bargains that others might consider unwise, the courts will typically enforce. Older adults may differ with others in the community or in the family about what is or is not fair in a relationship. In making this personal judgment of the situation, older adults may be looking to the context of their whole lives, the things that they value, what they want to accomplish, and how they want to help others important in their lives.

At the same time, the freedom to contract is also based on the idea that both parties have similar information, knowledge and understanding of the material facts and the consequences of the contract. For example, for older adults that is often not the case. There can be important and extremely relevant differences in education and functional literacy between the parties.

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[136] For example, a tax law might give a tax credit or tax deduction for a family to give care to a dependent older adult. In research, although there has been some discussion of the law as a way of influencing caregiving, there has been little systemic analysis to date on it.

[137] C. Kruse, "Contracts to devise or gift property in exchange for lifetime homecare - latent and insidious abuse of older persons" (1994) 12 Probate Law Journal 1-7.

[138] In legal texts such as C. Fried, *Contract as Promise* (Cambridge, Massachusetts: Harvard University Press, 1981), authors tend to look at contracts in the context of the open market, and outside of personal relationships. There is no real open market where one can purchase the intimate care of a family member.

In disputes over the validity of contracts, courts typically state that if the older adult has independent legal advice the contract entered into will be upheld. However, it is important to consider whether that is sufficient protection for safeguarding the interests of an older adult, if lawyers do not take the time to explain, if they do not understand the full range of older adults' needs and interests (and how they might differ from those of family), or if they already carry ageist assumptions about older adults.

## B. Wills and Estate Planning

The laws relating to wills represent different competing values. Two important ones are to pass property on death (frequently to one or more family members) and to abide by the testator's wishes (respecting personal autonomy and choice). Underlying the law of wills is the idea that an adult can dispose of his or her property as he or she sees fit. At the same time, wills variation legislation allows for the court to pre-empt those personal choices where there has not been sufficient provision for a spouse or other dependent.

In wills, the issue of relationships may arise after the older adult's death, when there are questions about the "suspicious" circumstances in which the will was drawn up and executed. The focus is often whether there was an improper relationship, or more accurately whether there was undue influence or coercion in that relationship, which the other person in the older adult's life exploited to his or her own benefit.

Wills and disposition of property can reflect three types of tensions in relationships:

1) Competing interests of the older adult versus those of family about "entitlement" to legacies;
2) Competition and dissension within family; and / or
3) Conflict between family and others involved in the older adult's life.

When wills are crafted in later years (and particularly as mental and physical health deteriorate), questions about the adult's testamentary capacity are more likely to arise. However, testamentary capacity is an all or nothing matter. A person either is or is not mentally capable to write a will. Courts are reluctant to rely solely on a finding of incapacity in wills. The fear is that to do so would gradually raise the standard of testamentary capacity needed to execute a valid will. That would work to significantly disadvantage older adults in making or revising their wills.[139] Doctrines like "undue influence" arise to allow courts some degree of freedom to redress perceived unfairness.

## C. Criminal Law

The criminal law represents a codification of minimum standards for people's conduct towards each other in Canadian society. It represents the State's interest in maintaining peace, not the private interest. The criminal laws and criminal law policy (e.g. on assault) on their face, apply to all. However, older adults face several obstacles in seeing that protection occurs when their personal relationships are threatened by violence.

For example, throughout Canada, police in many jurisdictions have a charging policy for domestic violence.[140] Typically it states, "that, in all cases where a police officer has reasonable grounds to believe an offence has been committed, charges will be laid. The victim does not lay the charge."[141]

The rationale behind the domestic violence charging policy is that violence in the family is not a private matter, but a social concern. The policy recognizes that by their nature, intimate relationships (such as with one's spouse, a past or current partner) can involve unequal power between the parties or other types of dynamics that effectively make it very difficult for the person to "choose" whether or not to charge.

Statistics Canada reports:

> *it is suspected that a small portion of abuse of older adults ever comes to the attention of the justice system... .*[142]

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[139] L.A. Frolik, "The biological roots of the undue influence doctrine: What's love got to do with it?" (1996) 57 University of Pittsburgh L.R. 841 at 883.

[140] See for example, Policy of the Criminal Justice System Response Violence against Women and Children, Part I Violence Against Women in Relationships Policy, Ministry of Attorney General, Feb. 1993. (B.C.).

[141] Manitoba's policy can be found Online: <http://www.gov.mb.ca/wd/violence/man_jus.html>

[142] *Ibid*. at 25.

In the 1993 Violence Against Women Survey, 2% of women age 55 and over reported they had experienced violence (spousal and non-spousal) in the previous 12 months.[143] That would represent at least 50,000 older women across Canada experiencing violence in a given year. However, the 1996 United Crime Reporting Survey II points out that in all of Canada, there were only 495 cases reported to the police of violent crime by family members against seniors (women or men).[144]

This is not surprising. Many older adults are very reluctant to call the police when being harmed or exploited by family. Also the domestic violence charging policies in most jurisdictions of Canada typically do not cover certain relationships that potentially affect abused seniors, such as abuse by adult children.[145] This barrier to justice is further enhanced by the fact that the police are less likely to charge an older spouse, the Attorney General's office is more likely to stay the charges (often based on concerns about the reliability of the older adult's memory), and the Court is less likely to incarcerate a convicted family member, particularly if the family member is an elderly spouse.[146]

Criminal law does not only address violence, it also includes economic crimes, such as theft by power of attorney. A power of attorney is one of the most commonly used ways that an older person is financially abused. It is typically granted by the older adult to a family member or friend that he or she trusts. In one study, it represented one half of the financial abuse situations seniors were experiencing. Abuse of powers of attorney potentially affects over 40,000 older adults in Canada.[147] Yet, according to the Uniform Crime Survey II, in the past three years, there have only been five instances where charges of abuse of powers of attorney have been laid anywhere in Canada, and in all five, the charges were stayed or withdrawn.[148]

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[143] Statistics Canada. *The Daily*. Nov. 18, 1993, Cat No. 11-001E.

[144] Statistics Canada, *Family Violence in Canada: A Statistical Profile*, Cat. No. 85-224-XIE. (1998) 25-26. Among reported crimes, older women were more likely to be abused by a family member than were older men. In 1996, more than one in four older female victims had been assaulted by a family member, compared to one in seven older men. Older men victimized by family were most often harmed by their adult children. For older women, most often the abuser was their spouse (42%).

[145] For example, in Manitoba, Crown Policy in Domestic Violence Cases covers violence or threats of violence, or other acts of a criminal nature which may include physical, sexual, emotional, or psychological abuse, committed against a person by that person's spouse, common-law spouse, boyfriend, girlfriend, or other intimate partner, past or present. Manitoba's policy can be found online: <http://www.gov.mb.ca/wd/violence/man_jus.htm>

[146] C. Spencer, *Social and Economic Costs of Abuse Against Seniors in Canada*, Prepared for Health Canada, Family Violence Prevention Unit, Ottawa. [forthcoming]

[147] *Spencer, supra* note 21.

[148] Personal communication with Statistics Canada, on the Uniform Crime Report Survey.

The low incidence of reports by older adults to the police of any kind of criminal harm by family and other trusted persons likely reflects several different factors working together to reduce the likelihood of older adult's receiving benefit of the law. First, a senior may not realize this matter is a crime. She or he may fear that the relationship will be seriously damaged if charges are laid, particularly if the perpetrator goes to jail.[149]

Older adults may feel personal embarrassment and fear social judgment. An older adult may feel that she or he is somehow responsible for the other person's misconduct because, after all, this is their child, and they raised him/her. In a world where there are few other respected roles for an older adult, the role of "good parent" can become very important. The grown child's actions become a reflection on them. Their children's successes become their successes; their children's failures become theirs as well. [150]

While these are important considerations, we should not ignore other factors. The model of service in the community, particularly in social work, is often a "family systems model", not an advocacy model. The focus is more on preserving the family relations than on advocacy for the older adult.

People in the community who are in contact with seniors are also often unaware of legal options, and have only a cursory knowledge of ways that the legal system might be able to work to the benefit of the older adult. This challenge is further compounded by the fact police are often unaware of other available options. For example, community service providers have found that police will tell older adults "we can't help you, that's a civil matter," without letting the older adult know how to access resources that can help. Similarly, lawyers may be unaware of non-legal resources.

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[149] R. Gordon, & S. Verdun-Jones, *Adult Guardianship Law in Canada* (Toronto: Carswell Thomson, 1992). In light of the fact that nursing placement is a common intervention, it is a realistic fear for many abused seniors.

[150] L. G. Forer, *Unequal Protection: Women, Children and the Elderly In Court* (New York, Norton, 1991).

## D. Family Law

Family law is mainly interested in children under the age of majority and parental responsibilities to those children. Family law is also interested in property disposition upon separation or divorce. With the notable excetion of filial responsibility provisions, there is scant mention in case law or legislation about older adults' relationships with family members. All Canadian jurisdictions have some form of legislation in family law that prescribes a responsibility of adult children to financially provide for parents in need. With the notable exception of Quebec, there has been little explicit recognition in legislation of grandparents' right of access to grandchildren. Canadian literature has only begun to discuss the issue of grandparent-grandchild contact or support.[151]

With a few notable exceptions, Canadian family law (particularly in terms of their spousal responsibilities to each other) has tended to treat older adults much the same as younger adults. Only fairly recently has there been discussion in family law about special issues that affect older adults. These include splitting and valuation of pension benefits (e.g. *Best* v. *Best*)[152] and marriage contracts where the couples have been married before and want to preserve certain assets for their "own children."

One of the challenges in this century and into the next is the proper role of government vis à vis families in caring for frail and ageing family members. In the United States, for example, the ideology of "familialism" — the primacy of families in meeting the care needs of their frail family members — supports non-intervention by government and the law until the familial situation becomes so overwhelming that the state has to intervene as a last resort.[153] The principle invokes the idea that family life should be a private matter, an area the State should not encroach upon. According to Clark:

> *By viewing this private domain of families as 'natural' or 'normal' the government is able to create an impression that non-intervention is justified and acceptable. The myth of the privacy of the familial domain*

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[151] E. Kruk, "Grandparent-grandchild contact loss: findings from a study of "grandparents rights" members. (1995) 14 (4) Canadian Journal on Aging 737-754. There has been some case law in Quebec on grandparents' potential financial responsibilities to their grandchildren.

[152] *Best* v. *Best* [1999] 2 S.C.R. 868. Supreme Court of Canada judgement July 9, 1999, on appeal from Court of Appeal of Ontario.
Online: <http://www.droit.umontreal.ca/doc/csc-scc/cgi-bin/repere.cgi?corpus=pub_en &tout=Best&language=en&form=doc%2Fcsc-scc%2Fen%2Findex.html&range=6&numdoc=463>

[153] P.G. Clark, *Moral Economy of Health and Aging in Canada* (Orono, Me.: Canadian Academic Centre, 1995) at 14.

> *serves the interests of the state and reinforces a conservative, traditional view of relationships and gender expectations with families.*[154]

Canada has generally been more willing than the United States to "share the responsibility" of helping to support older adults by assuring that appropriate formal and informal resources are in place. However, that has been challenged in recent years, by the reduction of services at all levels.

## E. Adult Protection Laws

Since the mid 1980s, there has been a growing recognition that certain older adults may be harmed by those they trust. The Atlantic provinces have enacted protection legislation aimed at helping abused or neglected older adults. These provinces have a department or unit dedicated to protection issues affecting adults. Adult protection has two main characteristics: 1) it provides services (or arranges for the provision of services); and 2) it has the legal authority to act on the behalf of the client, irrespective of his or her wishes.[155]

Adult protection legislation in Canada has been criticized for paternalistic overreach. Frequently based on a child protection model, the laws often fail to effectively balance state protective intervention and the right of the adult to self-determination and due process. Critics have argued that legislators in enacting adult protection legislation have failed to recognize the medical and psycohological differences between children and older adults, as well as the legal implications of the difference between intervening in the lives of children versus those of adults who, by law, possess fundamental rights and freedoms.[156]

Adult protection legislation becomes involved in older adults' personal relationships in several ways. Most importantly, it involves public scrutiny of the nature and quality of the relationship between the older adult and someone else, as well as public intervention. Largely, the adult protection caseloads do not deal with exploitation or harms by others. They deal with self-neglect, that is where the person lives in isolation, without family support.

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[154] *Ibid.*

[155] J. Regan, The Aged Client and the Law (New York: Columbia University Press, 1990) at 128.

[156] R. Gordon & S. Verdon-Jones, supra note 150.

## F. Guardianship

Guardianship law in Canada has been undergoing a gradual transformation over the last two decades.[157] Previously, most guardianship took an "all or nothing approach" in which an older adult was either deemed capable or incapable of making any decisions about his or her welfare. Depending on the conclusion about capability, rights to decision-making remained intact or were removed completely. More recently, there has been a shift in many jurisdictions to a more sensitive and sophisticated approach. Quebec takes a graduated approach, of different levels of tutorship and "mandataires" to assist the individual. At one end of the continuum is help given when requested by the adult, moving towards greater and more active involvement in the older adult's life, as needed. Other provinces now distinguish between the need for a guardian based on the type of decision that needs to be made (financial, health care, personal care) or the level of decision that needs to be made. A particular older adult might be capable of making decisions about day to day financial matters (e.g. how much to spend on groceries), but far less capable of making decisions about investments.

In the guardianship context, older adults' personal relationships come up when the courts (and public bodies that advise the courts, such as Public Guardians or Trustees) consider:

- *Who should be guardian; and*
- *How much investigation, before appointment and after appointment, should there be into the person's fitness to act as guardian.*

It has been recognized at law and in the community that some guardians, who are intended to be the remedy for abuse and harm, can be abusive, and that some people will use legal procedures to legitimize their exploitation.[158] In some Canadian jurisdictions, there has been community concern expressed that, in the push to have someone/anyone take responsibility for an incapable older adult, we may forget how much control they will have over that person's life.

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[157] *Ibid.*

[158] L.A. Frolik, "Elder abuse and guardians of elderly incompetents" (1990) 2 (3/4) Journal of Elder Abuse and Neglect 31-56.

## G. Health Law and Substitute Decision Making

It has been noted in many quarters that older adults are more likely than younger adults to experience legal issues around health care matters. This happens for two reasons: 1) the ageing process is characterised by changes to the health that can lead to chronic and progessive conditions and towards a terminal illness; 2) some older adults will experience changes in their mental health leading towards some degree of cognitive impairment that may affect their ability to make choices about their own care and treatment.

The role of relationships in these health care decisions quickly becomes apparent. In a hospital or institutional setting, it can be very difficult for an older adult to have his or her choices respected. Family members or other people concerned about the older adult frequently have to take on the role of advocate for the older adult, simply to have those choices heard and understood. Both research and family experience notes that there are important differences in how older adults are treated in institutional settings. To a large extent, it depends on whether or not there is family involvement in the older adult's life. Older adult's with family there to advocate (and agitate) on their behalf tend to be treated better than older adults who have no one.[159]

Substitute decision making involves sharing or relinquishing decision-making of parts of one's life to significant others. Family members often step forward informally to assume responsibility for making decisions. Health care professionals often rely on family to assist in making health and personal decision making without seeking formal appointment by a court.[160] Advance directives and guardianships formalize the substitute decision-making role within the family unit .[161]

Because of declining health or incapacitating medical crises caused by strokes or by slow deterioration of mental capabilities, older adults are more likely to be affected by substitute decision-making provisions in health law than any other age group. Substitute decision-making laws allow people to appoint whomever they want as having authority to make health care and life decisions if they become mentally incapable of making decisions on their own.

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[159] Association of Advocates For Care Reform, *Social Isolation of Seniors in Care Facilities* (Vancouver, B.C.: Peanut Butter Publishing, 1997).

[160] L. Wacker, "Legal issues and family involvement in later life families" in R. Bliezner and V. Bedford, eds., *Handbook of Aging and the Family* (Westport, Conn.: Greenwood Press, 1995) 284 at 289.

[161] *Ibid.* at 290.

### 1. Law Choosing for the Older Adult

However, when a preference has not been given, provincial laws give priority to certain people. For example, in Alberta, under the *Personal Directives Act*, chapter P-4.03, the priority order goes to "the nearest relative". This consanguinity table gives preference to: (i) spouse (husband or wife) , (ii) son or daughter; (iii) father or mother; (iv) brother or sister; (v) grandfather or grandmother; (vi) grandson or granddaughter; (vii) uncle or aunt; (viii) nephew or niece. Blood relatives are preferred over half blood relatives, and the eldest of two relatives of the same description (siblings) regardless of gender.

Many of these laws are based on the ideas that people in certain kinds of relationships are more likely to know and express the values, wishes and preferences of this older adult, if she or he becomes incapable of expressing those wishes. Or that at least family are more likely to make a better decision than a health care professional or other person. The laws, however, have difficulty where there is disagreement in families about what those decisions should be. By not acknowledging anyone other than family in that substitute decision-making table, it is evident that the law also has difficulty with the idea that people other than family may have more contact with the older adult and know his or her current wishes better.

### 2. Older Adult Choosing for Self

Health care directives (care proxies) are a relatively recent development in Canada. One half of the provinces make provision for an older adult to select someone (which may or may not be family) that she or he trusts to make decisions if the older adult becomes incapable of doing that.[162] Underlying these laws are a respect for personal choice, and control over one's body and health care. The development of the directives is also important because it recognizes that older adults, as with adults of any age, may not want to rely on family to make decisions for them if they become incapable.

Research indicates that the directives are used by only a very small percentage of older adults, and their use depends on an individual's level of education and culture. The documents themselves are often very complicated. They tend to be constructed to medical professionals' needs or the legal profession's mistaken understanding of the courts' needs. The documents are seldom in plain language and typically do not meet standards for ease of comprehension. Some older adults use the directives, not to write down their wishes, but as an important way to discuss some of the issues likely to arise and as a way of opening up communication between an older adult and family about personal values, life and death.[163]

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[162] See for example, B.C. Representation Agreement Act RSBC 1996, Chap. 405 (comes into force Feb. 28, 2000); Alberta, Personal Directives Act, Chapter P-4.03; Ontario Substitute Decisions Act, 1992, S.O. 1992, Chapter 30; Nova Scotia Medical Consent Act. R.S.N.S 1989, c. 279; Newfoundland Advance Health Care Directives Act, S.N. 1995, c. A-4.1.

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[163] D. High, "Why are elderly people not using advance directives" (Nov. 1993) 5(4) Journal of Aging and Health 497-515.

# CHAPTER VII

*La qualité du vieillissement est donc tributaire des valeurs sur lesquelles nous voulons poser les assises de notre société. C'est dans ces valeurs que s'enracinent les droits que nous reconnaissons aux personnes vieillissantes*[*]

~ Jacqueline Fortin ~

# Case Analysis

This chapter looks at the underlying assumptions in the law in the context of older adults' personal relationships drawing from three illustrative cases. Although we touch upon some legal issues, these are not legal analyses of the cases. Instead we use the cases to illustrate general themes and issues that often surface or function in the context of courts' understanding of and involvement with older adults' personal relationships.

The themes will differ, depending on whether we are looking at a family relationship or an extra-familial relationship (friends, acquaintances, professionals). In the context of family relationships, themes include: familial entitlement, perceived unity of interests with the older adult; familial care and responsibility; protection of interests; self-advocacy, autonomy, and respecting personal values; reliance on family; competition or tension between biological family, or old versus new family. A different set of themes surface within the context of non-familial relationships. These typically reflect extra-familial caution (cautionary tales); dependence and interdependence; power balance and imbalance, and perceptions of vulnerability.

In each of these cases, as in many cases involving older adults, the law does not discuss age, ageing or being an older adult as an issue, except to identify the age of the individuals. By having identified an age for one or more of the parties, the court on some level treats age as influencing the discourse. Otherwise, why mention it at all? Thus, age as factor often rests in the background, not the foreground.

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[*] Quality of aging is thus dependent on the values upon which we seek to build out society. The rights that we recognize to aging persons are rooted in the values." [Translation]

## A. *Kim* v. *DeCamillis*

The first case we draw upon reflects a civil matter, involving a man in his 80s (Mr. DeCamillis) who has a relationship for four and a half years with a woman 35 years younger than he is (Ms. Kim).[164] During that time, they lived together for over three years. The court describes their relationship this way:

> *Although they were very different, a relationship developed. He was fairly frugal with his money, and liked to wear the same old clothes all week long. She was fairly extravagant and liked designer clothes and antiques. He was gregarious and outgoing. She was shy. He was almost twice her age. They had little in common but one thing: they were lonely.*

Both parties had independent means (he had been a business man and she ran her own restaurant), and they shared living expenses. Mr. DeCamillis did not tell his family about his relationship with Ms. Kim for several months, until shortly before she was to move in with him.

Soon after, Mr. DeCamillis' son arranged for a lawyer to draw up a cohabitation agreement for his father and Ms. Kim, telling his father this was "to protect your stuff." The son later had a trust agreement drawn up in which his father signed most of his property over to the son and daughter.

Over the next few years, Mr. DeCamillis' health deteriorated. Eventually he was diagnosed as having colon cancer. Ms. Kim sold her business and devoted more and more of her time to Mr. DeCamillis' care. In the last months of his life, while in hospital, Mr. DeCamillis broke off the relationship with her, likely at the urging of his son and daughter, and with the help of a hospital nurse. He also evoked a codicil to his will. The codicil had permitted her to stay in his home six months after his death. Ms. Kim investigated her legal options. Ms. Kim subsequently sued for a share of the property (constructive trust) or unjust enrichment. She succeeded on the latter.

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[164] *Kim* v. *DeCamillis Estate,* [1999] B.C.J. No. 442 B.C.S.C.

In this case, there are three sets of relationships to be considered: 1) an older man and a younger woman; 2) an older man and his middle aged children; and 3) an older man, his children and a health care professional.

### 1. What Are the Gerontological Issues (Role of Age in the Case)?

Age influences the court's analysis and parties' description of the events. For any case, a major challenge to courts and to the legal system will be to determine "In what context is age relevant?" and "How can we avoid reacting to ageist assumptions and attitudes?"

Age likely becomes the family's reason for responding as they did. Age in this case centres on two elements: first, the man's age (he is in his 80s) and second, the age *difference* between the woman and man. As the court specifically notes,

> *For Dr. DeCamillis (the son) it is likely the normal reaction of... seeing his 80 year old father take up with a woman half his age, who had nothing in common with him, but stood to gain much of what he had worked all of his life to attain and preserve.... [The son] did what he considered to be in his father's best interest,...*

To illustrate the subtle influence of age and ageing, we should consider how would the case be decided (and would family ever consider reacting as they did), if the man was 65 and the woman was 32? If he was 45 and she 20? (In each case, one person is approximately twice the age of the other)? What is different in each, and why do people react differently?

## Protection and Paternalism

It is also evident in this case that the court views the son as acting "honourably" by protecting his ageing father. The implicit assumption behind the son's reaction, and the court's interpretation of it, is that we should be wary of any relationship between older adults and younger people of the opposite sex. There is an automatic assumption that being older is the equivalent of being "vulnerable", and that older adults are less capable of judging their own relationships. This particular case is very different from classic undue influence cases, where the perpetrator preys upon a person who from the beginning is physically dependent, or whose mental ability is deteriorating. In many undue influence cases, the perpetrator isolates the person from others, which is not the case here In many undue influence cases, there is also an imbalance of power. In the case at hand, Mr. DeCamillis had been in business until very late in life.

There is nothing to indicate any problem with his ability to think and judge for himself.

### 2. What Are the Social and Legal Issues?

*Is this a spousal relationship? (What does a spousal relationship look like in later life?) If it isn't, what kind of relationship is it?*

Ms. Kim characterizes this relationship as a spousal relationship. Mr. DeCamillis at several points proudly refers to her to friends and acquaintances as his "oriental wife". The family prefers to view Ms. Kim as a housekeeper / companion. These two characterizations carry very different rights and obligations for the parties.

Courts are keenly aware that no matter what the age of the parties or sexual orientation of the parties, it can be difficult for a court to determine whether or not a relationship is a spouse-like one. Matters become even more complicated for older adults in their relationships. The traditional view of marriage has been two young people starting off with little or nothing and building their economic and personal life together. It focuses on lives intertwining and financial dependence of one on another. That does not translate well where one or both of the parties have already acquired assets over time. In this case, there is the considerable interdependence of Ms. Kim on Mr. DeCamillis, and Mr. DeCamillis on her, with both sides benefiting from the exchange at different points in time and in different ways.

Another indicator that the court considered in this case was whether or not there had been sexual relations. This marker works to the disadvantage of some older males. The court also considers how would the people involved react to sudden disability -- would they stay or would they leave? In the facts of the case, Ms. Kim stays with Mr. DeCamillis throughout his illness and disability, taking an active role in his care even though it is very stressful on both. The two meet another important criteria of a spousal relationship that courts stress:

> *... entering the kind of psychological and emotional union that one associates with marriage.*[165]

In these situations, one of the difficulties for courts is the ambivalence and the ambiguity in the terms that people use to describe their relationship, at any age. In this particular case, the family did not find out about Ms. Kim until 3 or 4 months after Mr. DeCamillis and she first meet. There are many possible explanations for this --- that he hides it (possibly anticipating their reaction), or thinks it is not their business, or the family may have simply not been involved with their father very much at that point. The older adult, like any person, may also be ambivalent or uncertain about what the relationship means to him or her at that point. Also, the nature of relationships can change over time.

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[165] *Takacs* v. *Gallo* (1998), 48 B.C.L.R. (3d) 265.

### 3. Who is the Client?

This case raises an issue that arises often in lawyers' relationships with older adults -- when a family member comes to a lawyer to arrange a cohabitation agreement, a trust agreement or other document, just who is the client? Is it the father? Is it the children? How do you tell? What should a responsible lawyer do if their interests are different? There is little or nothing in the case as reported to indicate that the lawyer spoke with Mr. De Camillis to determine what he wanted.

## Presuming Unity of Interests

There is a tendency to assume unity of interests between older adults and their grown children. In having the cohabitation agreement drafted for his father, the son's described intention is to protect his father's "stuff." However the agreement does more than that. It also has the direct effect of preserving the son and daughter's interests to receive a legacy. This self-protection is further reinforced by having a trust agreement drawn up.

### 4. Whose Influence?

It is not obvious why Mr. DeCamillis broke off this relationship while he was in hospital. In the background, family may have been concerned that Ms. Kim could influence their father. It may be that he wanted to end the relationship, but was unsure how to do it and they helped. Or it may be that others simply did not want the relationship to exist because it offended their sensibilities (here is their father "at his age" living with a woman without benefit of marriage). It may be that the father found it more important to make peace with his children as he approached death.

It is also interesting to see the willingness of a health care professional in the hospital to help Mr. DeCamillis rehearse "what he needed to say" to his live-in partner of three years. The family and the health care provider work in concert to effect what they see as best in the circumstances. Once again, there are public and social perceptions of vulnerability among older adults (particularly those in their 80s) in their relationships with the opposite sex and different cultures, which we are much less likely to consider for younger adults.

## Autonomy

In each of the three cases discussed in this chapter, important issues of autonomy arise. According to the principle of autonomy those who are capable of decision-making must be allowed to make their own choices.[166] It is recognized that autonomy is a high priority but it is not absolute. It is also recognized that it is appropriate for people in the community and the state to become involved when the person is mentally incapable of understanding and appreciating the risks, and the options that he or she has. Respecting autonomy can take two different forms: 1) negative autonomy, which basically involves non-interference; and 2) positive autonomy, which involves not only allowing autonomous choice but enhancing it and finding ways for it to flourish, by providing information and seeing that appropriate resources are in place.

## B. *R.* v. *McCune*

The second case involves a 56-year-old man charged with second degree murder of his 83-year-old mother who was very frail and had dementia.[167] Barbara McCune died of a lacerated liver, and had multiple bruises on her body at the time of her death. The son and mother had lived together for 11 years. Their home was described as "exceptional". The house was piled high with newspapers so that the only places for the mother to eat were her bedroom and the bathroom.

In the weeks before her death, the son had struck her on at least three occasions. A few days before her death, concerned neighbours called the police after seeing the son roughly handle his mother and strike her while they were out for a walk. When the police investigated, the accused responded that his mother was elderly, didn't like to exercise, and to keep her going he had to keep "smacking her".[168]

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[166] B. Hofland, "Use of facts to resolve conflicts between beneficence and autonomy" in R. A. Kane & A. L. Caplan, eds., *Everyday Ethics, Resolving Dilemmas in Nursing Home Life*. (New York: Springer Publishing Company, 1990) 37 at 38. Also A. Tauer, "Risks and choices: when is paternalism justified" (in the same publication) at 45-52.

[167] *R.* v. *McCune* [1996] B.C.J. No. 649 (B.C.S.C.); *R.* v. *McCune* [1996] B.C.J. No. 650 (B.C.S.C.) ; *R.* v. *McCune* 131 C.C.C. (3d) 152 (B.C.C.A.) .

[168] *Ibid.* B.C.J. No. 650.

The following day, a community care assessor came to see her.[169] Barbara McCune was unable to understand the questions being asked her and was unable to satisfactorily communicate. In spite of her frailty, her poor physical condition, and her dementia, neither the police nor the assessor took her to a place of safety for a more thorough assessment. Two days later she died in her sleep. Crown argued that the death (lacerated liver) was the result of a blow; defence argued that she was very susceptible to falling, and must have become accidentally injured in a fall. The son was convicted of manslaughter and he was sentenced to one year in prison. The case was appealed, was to be sent back for retrial. The proceedings have subsequently been stayed.

In this case, we need to consider not only the relationship of the mother and son; but also son and mother in relation to other family members, and the mother and son to neighbours, and to the health and legal authorities.

### 1. What Are the Gerontological Issues (Role of Age in the Case)?

Age becomes a factor in three ways here: 1) the descriptions and understandings of the relationship ("son caring for ageing mother"); 2) age-related conditions (such as the mother's physical state, her senility and her dependency on her son); and 3) the case as exemplifying elder abuse.

### 2. What are the Social and Legal Issues?

'This case raises numerous legal issues in which ageing and relationships interact, only a few that we touch upon here:

## The Responsibility of Children to Protect

In this case, there are other family members who see what is happening to their mother. What is their responsibility? There has never been any discussion in Canadian literature on whether there is a responsibility on the part of an older adult's children to aid the parent who is experiencing abuse. In the Uniteed States, there has been an effort to draft just such a vill imposing a duty on all children to seek aid for a dependent parent whose life is in danger.[170]

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[169] *Ibid.* B.C.J. No. 650.

[170] J. Blair, "Honour they father and mother"- but for how long? Adult children's duty to care for and protect elderly parents" (1996-97) 35 Journal of Family Law 765 at 781.

## Determining Motive

Throughout the trial, the defence lawyer characterizes the relationship as one of a son *caring for* his mother for 11 years, and that therefore the death must have been an accident. Behind this concept of *caring for,* is the idea that there must be *caring about*, particularly if the older person's care needs are great. Otherwise why would the person continue doing it? This, in turn, leads many people to assume that that the younger person is self-sacrificing, and derives little or no benefit from the situation.

Gerontological research indicates not all "caregiving" is based on *caring about*. Some family members respond out of guilt, culturally driven expectations and morality, as well as greed and subjugation.[171] For some, there is a psychological dependence. It gives the person the opportunity to control and affect this other person's life in a multitude of ways. Also, being a caregiver gives the younger adult a very special role in society, almost a sacrosanct one. It carries with it the idea of "giving up" other roles, and self- sacrifice. The person "giving care" sometimes can be extremely reluctant to give up that role, particularly if the person has no other role-identity, or if the person receives other benefits from the relationship such as a roof over his head and financial support.

## The Lack of a Police or Community Response

Neighbours witnessed the son assaulting his mother a few days before her death, and he admitted it to health and legal authorities. The son was not charged with assault. Even basic domestic violence protocol such as interviewing the suspected abuser from the victim was not followed in this case. In spite of an injury and her obviously frail condition, and possibly being mentally unable to make her own decisions, Mrs. McCune was not offered some form of safety or respite, or taken to hospital for examination. The obvious question is "Why not?"

Existing police charging policy did not cover abuse in this kind of relationship. Health care policy may not have permitted the involvement ("intrusion") of health care providers, in this relationship.[172] Partly because of scarce resources such as long term care beds, there is a tendency to not interfere in a relationship unless absolutely necessary. There is some evidence that health care had been negotiating with the son to place his mother in a long term care facility. He had actively fought this option earlier, on the basis that they would not give as good care as he did. Arguably, the health care providers may also have been concerned that by taking the mother from her home, they may have been creating other potential harms for her or to the relationship. However, in this case, Barbara McCune's autonomy has not been respected. She has simply been cruelly abandoned to it.[173]

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[171] C. Pesiah et al., "The Parent Adult- Child Relationship Questionnaire (PACQ): the assessment of the relationship of adult children to their parents" (1999) 3 (1) Aging and Mental Health 28-38.

[172] B.C. had been reviewing its guardianship legislation for several years. In 1993, new legislation was passed. It took six years for it to be proclaimed, and it comes into effect Feb. 28, 2000. It was aimed at offering people more respect of their rights in guardianship, and more

## Proving Cause of Death

Proving cause of death in the McCune case is complicated by the fact that older adults are more likely to experience certain physical health conditions that can a) mimic abuse; b) hide abuse; or c) create greater harm from abuse than it would for a younger adult. Falls for example are very common among older adults. That simple fact becomes a way of explaining a way injuries ("oh, she fell in the bath") caused by abuse. A small push that would do no harm to a younger adult or a healthy older adult, may lead to significantly greater injuries for a frail older adult.

On the other hand, there are other possible explanations for Mrs. McCune's injuries other than her son assaulting her. In this case, obviously, Barbara McCune cannot testify to what happened. Even if she had lived, her evidence would likely have been considered unreliable because of the degree of her cognitive impairment. Even where older adults do not have dementia, their credibility and the reliability of their memory is highly likely to be questioned, by police, Crown prosecutors, and obviously the defence.

### 3. Who Has the Authority?

There is nothing in the available public material to determine whether or not Mr. McCune had any legal authority over his mother, e.g. committeeship to control where she lived (whether or not she should live in a care facility), whether she should go to a hospital, or what was in her best interest. However, the simple fact that the two lived together, that she was physically and mentally impaired, and the fact that he effectively controlled access to her gave the son *de facto* control over his mother and, thus, her life.

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alternatives to full guardianship, plus support and assistance to vulnerable adults who could not access help on their own.

[173] *B. Hofland, supra* note 168 at 38.

## Elder Abuse

One of the challenges in this case is how to move from a sociological concept to a legal framework. Even though this is identified by the court as an "elder abuse" case, there appears to be very little understanding of the concept. That proves disastrous for the prosecution when the Crown presents its case. There is a fundamental oversight of long standing neglect going on in this case before the death. There appears to be little or no understanding of the potential benefits that the son derived from the relationship and the control he exerted in this situation. There also appears to be little understanding that the son's "advocacy" for his mother, and his efforts to keep her out of a care facility could just as easily be signs of abusive behaviour, as signs of caring.

At trial, McCune's brothers described him as "loving, solicitous, caring. Just absolutely devoted to her. Her welfare became like a crusade for him."[174] In this context, it is very easy to rationalize or minimize the son's abusive behaviour by instead focussing on "all the good things" that he did for her over the years. Elder abuse experts describe this as "ledger book accounting".[175] The rationalization allows the person at least one or more "kicks at the cat", simply because of all the good that he or she has done previously.

## Sentencing

In this case the court struggles with what is an appropriate sentence for a son convicted of manslaughter of his frail mother.[176] Is imprisonment appropriate where the death is the result of elder abuse? While the chance of recidivism appears low,[177] the sentence also needs to fall in line with sentencing for similar acts perpetrated against children and abused women.

In some elder abuse cases (e.g. those not involving a person's death), it may be that justice could be better served by providing appropriate training for police and health care providers about recognizing and dealing with abuse more appropriately. It may be better served in the long run by educating lawyers and the courts about better representing the interests of older clients or older complainants. Justice means ensuring that there are community resources available for the abuser and the victim. However, it also means recognizing that it is appropriate for the state to step in when the person is no longer capable of assessing the risk to his or her own safety.

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[174] "Man accused of killing mom a 'loving son'" *Vancouver Sun* (31 Jan 1996).

[175] S.K. Tomita, "The denial of elder mistreatment by victims and abusers: The application of neutralization theory" (1990) 5 (3) Violence and Victims 171-184.

[176] For a general discussion see, B. Mc Mahon, "Vols avec violence à l'endroit de personnes âgées: Le facteur de réhabilitation doit céder le pas à la dissuasion" (26 juin 1998) 6(10) La presse juridique

[177] As one only has two parents or two parents-in-law to potentially abuse or neglect.

## C. *Sawatzky* v. *Riverview Health Centre*

The third case revolves around the relationships between a 78-year-old man, his wife, and health care providers. Mr. Sawatzky had Parkinson's disease and other medical health problems.[178]

While he was in a health care centre for assessment, a do-not-resuscitate (DNR) order was issued for him without his knowledge and consent or that of his wife. Once she learned of the order, Mrs. Sawatzky sought an injunction against the health institution and a declaration that the DNR order should not be issued. This was not Mrs. Sawatzky's first or only battle with the facility. When Mrs. Sawatzky refused to sign for her husband to have a tracheostomy (which would have made it impossible for him to communicate verbally), the doctor arranged for the Public Guardian and Trustee to take over decision-making for Mr. Sawatzky.

The Public Guardian and Trustee (PGT), who had been appointed earlier in the year as Mr. Sawatzky's guardian, chose not to make any representation on Mr. Sawatzky's behalf at the court hearing. This was based on a policy decision not to get involved in any decisions involving withholding treatment. He is thus left without anyone to represent his interests.

### 1. What Are the Gerontological Issues (Role of Age in the Case)?

Obviously, in *Sawatzky*, age is important. Mr. Sawatzky is in his late 70s, and his wife is likely around the same age. That simple fact affects how others, (particularly the medical profession) will view him, his medical conditions, his life and its value, his potential, his quality of life, and his quality as a person. It affects whether they see him as a person in the first place. It can affect the extent of the efforts that others try to communicate with Mr. Sawatzky to allow him to make his own decisions, and whether or not they make an effort to understand and respect his wishes. There is very little evidence that they tried.

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[178] *Sawatzky* v. *Riverview Health Centre*, [1998] M.J. No. 506 (Q.B.).

Age can also affect how people, in this case health care providers and the Court, view Mr. Sawatzky's wife as being able to understand him and how they view her skill as a proxy decision-maker. She is not only a substitute decision-maker, she is an older substitute decision-maker, and she is an older female who is a substitute decision-maker. American research indicates that women's personal health care decisions are more likely to be scrutinized by the court and determined as "not rational decisions" than are men's personal health care decisions.

### 2. What are the Social and Legal Issues?

## Control over Decision making (Autonomy)

Several fundamental questions are raised in *Sawatzky*, focussing on different aspects of autonomy:

- *"How can I speak for myself?"*
- *"If I cannot speak for myself, who will speak for me?"*
- *"Who controls my life and whether I continue to live?"* and
- *"Who determines whether I have any quality of life?"*

One of the most puzzling issues in this case is to what extent did the staff at the facility try to communicate with Mr. Sawatzky as to what he wanted? Did he want a "do not resuscitate" order in place?

The hierarchy for decision making is always: 1) the person's current wishes; 2) if that is not known, then their pre-expressed wishes (written or expressed to others); 3) if that is not known, then their values and beliefs; and finally 4) their best interests. The hospital staff have jumped immediately to their *version* of #4.

## The Need for Advocacy

By virtue of the fact that he is in a care facility and that he cannot communicate very well at present, Mr. Sawatzky needs someone to advocate and agitate on his behalf, to have his rights respected. Mrs. Sawatzky had been trying to do that, both in the hospital and at court.

In this case, Manitoba League for Persons with Disabilities was permitted to be an intervenor, to represent to the court the quality of life of a disabled person and the way that disabled people are currently treated by the medical profession. No seniors group made a similar application.[179] The fact that the League applied for intervenor status in this case is noteworthy. Throughout Canada and the United States, disabilities groups and seniors groups have seldom worked together on health care or other social issues, despite the fact that on the face they would seem to have some common interests. Disability groups do not want to be seen as old and seniors groups often work hard to break any perceived ties between age and disability. Disability groups tend to focus on a right to receive treatment and to live their lives to their fullest potential. Seniors groups tend to focus on the right to die with dignity.[180]

The question is raised: Who can best speak for an older adult who has a disabling condition? Which is more germane, that he is older or that he has a disabling condition? Does it make a difference to separate one from the other? The court notes:

> *Disabled people are likely to view the value of the life of a disabled person very differently from people who are not disabled. How often have you heard someone say that they would rather be dead than to live with a serious disability? And yet, I suspect that for many that would change if they had to make that actual decision.*[181]

Can we say the same for an older person? Will an older person value the life of an older person differently from people who are not old? Will an older person who has a disabling condition (and those who have a relationship with that person) value the life differently from younger people, from younger people with disabilities, and from older people who are not disabled?

## Expressing Wishes

The focus in this case is almost exclusively on verbal communication. Even before his tracheostomy, Mr. Sawatzky had Parkinson's disease and other conditions that can affect speech. As a society we place a premimum on the ability to communicate and erroneously equate an inability to communicate with mental incapability. Parkinson's disease does affect communication, not typically cognitive ability.

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[179] *Sawatzky* v. *Riverview Health Centre Inc.*, [1998] M.J. No. 574 Manitoba Court of Queen's Bench, December 21, 1998.

[180] See for example, Special Senate Committee, *Of Life and Death-Report on Euthanasia and Assisted Suicide* (Ottawa: Queen's Printer, 1995). <http://www.parl.gc.ca/english/senate/com-e/euth-e/rep-e/lad-tc-e.htm>

[181] *Supra* note 181, Para. 48.

Also as people who have physical or mental disabilities can readily attest, verbal expression is not the only way to communicate ideas and preferences. A consent is not just a signature, it is a process: it can be an oral consent, a signature, a conduct (for example presenting your arm for an injection) or an alternative communication (blinking the eyes, tapping, etc.)

There is clearly a difference of opinion between Mrs. Sawatzky and the staff as to her husband's condition and his mental capability. Mrs. Sawatzky states that, while her husband has difficulty communicating (in part due to the tracheostomy the doctor ordered), she is able to communicate with him by a combination of vocalizations, gestures and hand signals, and through these he is able to tell her what he wants or does not want. The couple, like most couples who have been married a lengthy time, already have a history of being able to communicate with each other in different, and often subtle ways.

## Substitute Decision Making

In this particular case, the attending doctor disagreed with Mrs. Sawatzky as to whether there should be a DNR order on file. In response to Mrs. Sawatzky's "failure to agree", the doctor applied to a mental health authority to effectively take decision-making away from her. The simple solution was to have Mr.Sawatzky deemed mentally incapable. This represents a fundamental omission of any form of due process. Neither Mr. nor Mrs. Sawatzky are given any kind of notice that he will lose his rights until after the fact.

This leapfrogging Mr. Sawatzky and ignoring Mrs. Sawatzky, may represent fundamental differences in power between older people and professionals. We may be seeing an ageist response, where a younger person who is a professional is viewed as "reasonable" and an older person as "less reasonable", as well as an elitist response in which a professional is viewed as "reasonable" and a lay person as "not as reasonable."

The health care professionals, and the lawyers arguing on their behalf use the fact that the couple have been together 40 years as evidence that she would be a poor judge of her husband's condition and quality of life ("she is in denial"). The implicit idea is that Mrs. Sawatzky would be lonely if her husband died and, as a result, she is acting in her own interests. There is a far stronger argument that if a substitute decision needs to be made, she is far better placed to make it. She has lived with her husband and his Parkinson condition since its onset years before. She more likely knows his strengths and hers.

The medical field tends to operate in a hierarchical fashion where one person (the professional) is "expert" and others must acknowledge and acquiesce to that expertise. But in this situation, who is likely to be the more "expert" at understanding Mr. Sawatzky in the context of his whole life. Can the parties combine their relative "expertises"?

### 3. Is this Couple Really Alone?

It is important to consider the Sawatzky's in the wider context of their lives. The couples are Jehovah's Witnesses and their religion affects their beliefs and ideas of how people should approach life, progressive and terminal illnesses, and death. It also offers another set of relationships to consider -- the couple in relationship to a spiritual power and to members of their church.

A recent Jehovah's Witnesses' publication about surviving strokes explains the ways that having a serious condition can strengthen the person's relationship with Jehovah, how people's belief can help and support them in coping with the crippling effects of a serious condition.[182] The article points out that from their spiritual perspective, this can be an important opportunity for a person to feel the warm love and support of his spiritual family. According to the author, the burdens of the person's physical condition are shared with the higher power and friends. This particular faith gives a promise of complete healing one day, so the people do not concentrate on the disability. The focus is on health, living with the condition and concentrating on more positive things. Thus, Mrs. Sawatzky's reactions seem far more "reasonable" in the context of her faith.

## Law and Ethics

A recent Canadian Medical Association article points out that the *Sawatzky* case illustrates doctors relying on "futilitarianism." This is the belief that physicians may unilaterally refuse to provide treatment they believe to be useless. In cases like *Sawatzky* doctors are making judgements not about whether the person will survive resuscitation (quantitative futility) but qualitative futility. Qualitative futility is about values. "Allowing the values of physicians to trump those of patients gives undue emphasis to the evaluations of physicians." Author Susan Rubin in *When Doctors Say No: The Battleground Of Medical Futility* notes "Nothing in the therapeutic relationship between physicians and patients supports the deliberate imposition of physicians' own idiosyncratic value judgments (or their professional values) on patients in this fashion".[183] Indeed, it is the patients who are in a "privileged epistemic position and hence their wishes should be given primary consideration."[184]

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[182] The Cleveland Clinic Foundation (Department of Bioethics and the Ethics Committee) in its website on "Contemporary Issues" provides an article: James D. Eckert Chaplain Resident, *The Jehovah's Witness Tradition: Religious Beliefs and Health Care Rev*. Online: <http://www4.clevelandclinic.org/education/bioethic/biocon12.htm>

## Feminist Ethics

Much of the discussion in *Sawatzky* focuses on traditional medical ethics. Its foundation has been built on moral theory and philosophy which draws upon abstract or rule-based principles.[185] Medical ethics have been strongly influenced by utilitarianism and Kantian deontology. In our Western culture, one of the most highly regarded principles is that of autonomy. "This principle assumes that individuals are equal, independent and rational, and the role of ethics vis à vis this principle is to clarify obligations among individuals."[186]

However, feminists have long recognized that all people are not treated equally by other social actors. Ethical analysis from a feminist perspective recognizes not only the unequal power of men and women, but also the reality of inequality between white people and people of colour, doctor and patient, rich and poor, etc.[187]

This "feminist" approach to solving ethical dilemmas stresses that first, caring is vital to healing. Also, feminist ethics is framed in the context of relationships. We cannot separate the decisions that we make from the context of our relationships, how we feel, and what our goals are. A person may make very different choices depending upon how others influence that choice, and how the choice might influence others. This broader view looks at decision-making in the context of Mr. Sawatzky alone, but also in the context of Mr. Sawatzky to his wife, her relationship to him, and who will be responsible for care if he ever goes home. Another important aspect of medical care is the nature of the relationship of doctor and patient. The level of trust, openness, and mutuality strongly affect patient satisfaction and outcome.

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[183] S. Rubin, *When Doctors Say No: The Battleground Of Medical Futility* (Bloomington, Ind.: Indiana University Press, 1998) at 85.

[184] *Ibid.* at 88.

[185] J. Susan Stagno, M.D., *Feminist Ethics*, Department of Bioethics Cleveland Clinic Foundation Online: <http://www.ccf.org/ed/bioethic/biocon2.htm>

[186] *Ibid.*

[187] *Ibid.*

## D. Considering Capabilities

Each of these cases raises complex and often subtle issues about older adults and their personal relationships. In each, the older adult's mental capability, and people's perceptions about capacity, is a major influencing factor. Below, we offer a way of thinking about mental capability, in which the "intervention" (people's response to the situation) should be a reflection of the older adult's mental capability. It is also important to recognize that the person's mental status can move either forward or backward among these levels.

### The Intervention is a Function of Capacity[188]

| **Capability** | **Intervention (by others, or the State)** |
|---|---|
| Capable | None |
| Slight incapacity | Supported decision making |
| Partial incapacity | Limited or partial decision making |
| Full incapacity | Plenary or full guardianship |

In *Kim* v. *DeCamillis*, the evidence strongly suggests that Mr. DeCamillis is capable but can be persuaded by family. They in turn are concerned that Ms. Kim can influence him. In *R.* v. *McCune*, the evidence strongly suggests that Barbara McCune was fully incapable at the time around her death. This is the type of situation in which the State's interest is the greatest, particularly if there is harm suspected. Her son should not have been representing her interests without express legal authority and her care by him should have been subject to the scrutiny of the state. Her safety is fundamental over any "rights" the son might have.

*Sawatzky* is the most challenging case of the three cases. Mr. Sawatzky may have been fully capable, but no one took the time to find out. He may have had slight incapacity where he might need support from his wife and others in decision-making. However, there is nothing to suggest having the Public Guardian and Trustee take over decision-making was needed, particularly when that responsibility was subsequently abdicated, leaving Mr. Sawatzky having no one to speak on his behalf.

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[188] R.M. Gordon, as described in CRIM 418/GERO 410 Adult Guardianship Law (Simon Fraser University, 1999)

In the cases presented, many different themes about age, aging, and older adult's personal relationships have come to the fore. First, in many situations there is a latent and in some instances patent ageism. It can arise in the facts put before the court and how those "facts "are interpreted. As Charles Weijer, writing for the *Canadian Medical Association Journal notes*, "The notion that facts are 'value free' is a fiction."[189]

Values are reflected in an older adult's, a family member's or a physician's view of the situation. Values are reflected in the police's, lawyers' and courts' understanding of relationships (or in some cases lack of understanding) and assumptions about relationships at this stage in life. There are often many implicit assumptions about family, caring and caregiving. The interpretation of "facts" may reflect their personal experiences as children to their own ageing parents or as adults growing older themselves.

In the cases presented, paternalism and protection of older adults are common themes, particularly when it comes to dealing with older adults' financial resources. The cases underscore how courts can sometimes overlook the mutual dependence and interdependence of older people to each other and to others.

Each issue, theme or value gives rise to extremely important conclusions. In some cases, older adults can experience serious violations of basic rights and entitlements that younger adults commonly receive. Some of the situations will create a differential impact on older adults than younger adults, simply because more older adults are likely to be in that particular situation. Some cases involve too strong a response and others too weak a response.

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[189] C. Weijer, "Why I am not a futilitarian" (1999) 160 Canadian Medical Association Journal 869-70.

# CHAPTER VIII

*We are not limited by our old age; we are liberated by it.*

~ Stu Mittleman ~

# Discussion and Recommendations

The Law Commission of Canada was created in 1997 to provide independent, strategic and timely advice on legal policy and law reform issues to the federal government and Parliament. After consulting with a broad spectrum of groups and bodies, the Commission undertook an important strategic initiative—to begin understanding the nature of the existing and quickly changing personal, social, economic, and governance relationships in Canada. This was seen as an important step to helping the Commission, and in turn helping Canadians, seek new concepts of law and new approaches to law reform.

In focussing on personal relationships as one of the four cornerstones for its strategic direction, the Commission recognized that

> *positive and respectful relationships of intimacy, affection and dependence or interdependence between individuals are among the most fundamental building blocks of a healthy and secure society. Healthy relationships are founded on the autonomy and dignity of and respect for the individual.*[190]

The Commission stressed that societal institutions, including the law, should reflect those principles and promote the necessary conditions in which older adults' relationships can flourish.[191] The Commission has pointed out that legal institutions and other institutions in our society regulate close and intimate personal relationships in ways that run counter to that objective:

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[190] Law Commission of Canada, "Personal Relationships: Elderly Persons" Online: <http://www.lcc.gc.ca/en/contracts/981022.html>

[191] *Ibid.*

> *Canadian law now rests on a number of assumptions about how people organize their private lives, and how they relate to their partners, parents and children. These assumptions are frequently out of touch with the facts. Consequently, the legal policies and procedures derived from them tend to be obsolete or counter-productive.*[192]

Throughout this report on the law and older adults' personal relationships, we have provided a broad context for understanding older adults and the range of personal relationships they have. We have described some of the ways that the legal system has been involved in older adults' lives and relationships, sometimes protecting them from harm, other times inadvertently creating harm.

## 1. What Are Canadian Social Values?

In Chapter IV we saw that Canadians embrace a variety of different social values. Which ones will be viewed by our society as most important at any given point in time will depend on the context and issue under consideration. Some values such as non-discrimination, fairness and due process are expressed in the *Canadian Charter of Rights and Freedoms* and the provincial human rights charters and legislation. They aim to assure that all Canadians are respected as persons and that all have an equal opportunity to contribute to and participate in our society. We strive to respect diversity in our society, not only a diversity of nationalities or abilities, but also a diversity of ages. Our strength as a society comes from that diversity.

Some social values can be reflected in our government policies, such as special tax credits for giving care, or old age security benefits that are universally available. The first places value on giving care to someone who is dependent. The second reflects an awareness of and valuing of an older adult's past contribution to our society.

As a society, we tend to place a fair amount of value on freedom of personal choices and self-determination. We tend to appreciate and support a fairly broad private sphere in people's lives that they can order and arrange as they see fit. As a society we try not to intrude into that private sphere, unless there is some compelling reason. We tend to value peaceful coexistence, in which people do not exploit or harm one another, and we believe that it is appropriate for the State to protect society from violence and abuses.

In Chapters II, V, and VII, we note that Canadians also tend to value respecting and preserving the family unit whatever diverse form that "family" may take over the years (ageing husband and wife; widowed mother and daughter; three generations living in one house or 1000 miles apart; ageing siblings). We express the fact that these are some of our social values in many different ways. For example, we respect the family by expecting that members of the family will be there to give emotional or other forms of support that a person might need, by assuming that the family knows and understands the person well and by listening to family members talk about what this older adult would want when he or she is not capable of expressing his or her wants.

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[192] Law Commission of Canada, "Strategic Agenda and Research Plan" Online: <http://www.lcc.gc.ca/en/about/agenda.html>

We value compassion, in the social sense of protecting those we consider as vulnerable to harm, or less capable of taking care of themselves. We see ourselves as having a collective responsibility to those who cannot take care of themselves or cannot protect themselves. We also value independence and people's right to take certain kinds of risks that do not hurt others.

These are a few of our society's espoused values. Against this backdrop is the reality of life for many older adults. We tend to value youth over age, in the sense that those who are younger are seen as potentially contributing more to our society now and in the future than those who are older. We have tended to value what others may give us in the future more than what older adults have given us in the past. While we talk about preserving families, public bodies such as Justice Canada often overlook older adults as being a form of family or being a part of families.

While most Canadian laws are applied to older adults in the same way as to everyone else, some existing laws affect older adults in adverse and unfair ways. Discrimination on the basis of age still exists. Together B.C. and Ontario have over one-half of the entire senior population in Canada.[193] Both have failed to include a protection for people aged 65 and over from discrimination in one or more areas of their human rights legislation. Throughout our country, age discrimination has remained evident in our mandatory retirement policies, and the courts' legitimization of this type of discrimination as justifiable in a democratic society. Age discrimination is evident in adult protection legislation. The legislation may or may not refer to a specific age at which one will be considered to be in need of protection, but in its application and its effect it will touch upon far more older lives than younger ones. Other Canadian laws are neutral on their face, but those who apply them to the lives of older Canadians forget or fail to understand the purpose behind the law. For example, substitute decision-making is the act of communication, it is not the legal form on which it is written.

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[193] Statistics Canada, CANSIM (1998) Matrices 6367– 6379.

## 2. Understanding Older Adults in Canada Today

In Chapter I we pointed out that there is no one typical portrait of the older Canadian; there is considerable diversity. There is not "ageing" in Canada, there are many "ageings." The current generation(s) of older adults differs from the generations before them in life experience and social expectations, and they will likely differ from those that follow in the next generations.

At present, growing old is a gender issue. It reflects a female condition. Among people age 80 years and older, two out of three are women. The majority of older adults experience a fairly healthy ageing, and they stand a good chance of living into their late years with some chronic health conditions but not a lot of effect on their activities. They also have a very good chance of being able to remain mentally fit even into late life. Mental incapacity or dementia affects 1 in 50 seniors at age 65, and 1 in 3 by age 85. That means that even among Canada's oldest old, the vast majority are still very capable of making decisions and choices for themselves.

Older adults' health is often determined by their economic circumstances. Those who are better off financially tend to be healthier, on average. Today's older adults are better off financially than many generations of seniors before them. However, for many (particularly older women) that situation is tenuous. While able to live comfortably if married, almost one in two unattached older women (widowed, separated, divorced, or single) lives below the poverty line. That transition to a new and frightening reality often happens at widowhood or divorce.

Today's older adult is better educated that his or her parents were. The general education level among older adults is likely to continue to increase, but other rapid changes (e.g. in technologies such as ATMs, computers, voice mail) may leave some increasingly dependent on others.

Our society has had very different types of expectations of older adults. To some extent we expect them to disengage from certain kinds of roles and activities. To some extent, that has meant that in our society older adults have been left at the periphery and have not been treated as integral members of our society.

## 3. Understanding Older Adults' Personal Relationships

Chapter II illustrates that, despite common stereotypes, most older adults in Canada are neither socially isolated and abandoned by family nor overwhelmed by family support. Instead, most older adults experience and prefer their family involvement to be "intimacy at a distance".

Much of what is written in terms of research on older adults' relationships focuses on support provided to older adults and the strain and burden being placed on others (primarily family). These ideas tend to misconstrue the reality of life for many older adults in their relationships. The idea that older adults pose only burdens for other family members or to us as a society, or the idea that they are socially isolated from contacts with other family members, appears to be more of a myth than reality. Recent literature and research, particularly that focussing on "mutual help" or "reciprocal aid", emphasizes two-way interactions and the interdependence in relationships, where people give each other different types and amounts of support at different points in time over the life course. Older adults do not simply receive support from others, they give it freely to others.

Older adults' experience many different types of relationships. These may involve being a spouse, a sibling, a grandparent, a co-resident (for those living in institutions) etc. This relationship may be a new friendship or one that has endured 50 years. While people's immediate reaction to the term "personal relationship" often tends to focus on family, for many older adults, friendships are the extremely important to them. These are people who know them well as they now are, and who remember who they were before.

Some older adults' personal relationships are chosen (e.g. friendships), others are to some degree imposed on us by external structures and social norms (e.g. roles in the family). Typically one does not choose one's family, but as an adult one can choose how much involvement to have with them or whether to have any involvement with them at all.

Personal relationships have both subjective and objective components. Their value is judged by the parties to the relationship. It is sometimes scrutinized by those outside it. Positive personal relationships are seen as contributing to an older adult's personal well-being. Relationships give the person a history and sense of continuity—others know and remember the "me" who was, as well as the ageing "me" who currently exists.

Not all relationships are positive though. Some can be locked in a point in time. Some are like a dance, following the same old patterns of behaviour towards one another repeated many times before.

### 4. Older Adults, Their Personal Relationships in Relation to the Law and Its Actors

Chapter III underscores that the law has not really had a framework to think about older adults and their lives. The law and its actors have tended to either treat older adults as the same as all other adults, ignoring relevant differences, or to put them in a separate category based only on age, whether or not it was relevant to the issue. We should not be surprised by the law's omission of older adults. During the time when common law and *code civile* ideas were developing, older persons were a rarity and families were plentiful. Issues were framed in terms of responsibilities, not rights.

When older adults were involved with the law it was because it was felt they were being exploited because of their lack of education or reduced mental capacity. The law has tended to see older adults' interests expressed largely in terms of physical and mental deterioration or dying. The former includes guardianship, health law and substitute decision-making. The latter includes wills and estate planning.

Chapters V and VII point out that older adults can have significant difficulty in having their relationships respected and recognized by others at critical points in time, such as when they are unable to speak for themselves. The law (by which we mean the police, lawyers, courts and social services) has sometimes failed to respect older adults and failed to protect older adults from their relationships with others. It has failed to give the same protections that others enjoy.

The law and society often make assumptions about people simply because they are older. The law and society also make assumptions about older adults' relationships, including assuming there is a relationship or ignoring relationships outside of the spousal or family kind.

There are many actual practices, in health care and social services in particular, that can deny older adults the right to be informed, consulted and to make decisions for themselves. It is difficult for an older adult to keep control on his or her life. The central question appears to be "What is the possibility of me, as an older adult, having my wishes heard and respected, as those wishes are expressed by me or someone I trust?"

The legal system has not been very sensitive to these issues to this point. The law has been challenged to understand whether age alone (as opposed to declining mental ability or other special need) should ever be used to categorize a group of people to impose the state's power on their lives.

## 5. Some Recommendations

Throughout this report we have highlighted a number of challenges that older adults face in having their relationships (positive, negative, or somewhere in between) understood by the law and others, and having their rights and their needs respected in the justice system. There is a strong need for cross training.

That means education and training for legal actors (law enforcement, lawyers, courts) on ageing issues, including but certainly not limited to competency and positive ageing issues. It also means education and training on basic legal issues affecting older adults for parties who work with seniors and are in a position to make referrals.

Information to both these groups to help sensitize them is a first step. However, there is a need to redress some of the existing power imbalances that can arise in older adults' relationships. Many of these reflect a lack of good, plain language information made easily accessible to older adults on how the law can affect different parts of their lives, presently and in the future. This information needs to be presented at a level they can understand, in whatever language they speak, and appropriate to their culture.

Older adults also need far more appropriate support and services to help see them through the justice system. Institutions such as the Advocacy Centre for the Elderly should not be the exception, they should be an integral way for older adults to access justice. There is a need for review of all Canadian laws (statutes and common law) and regulations to identify potentially discriminatory provisions based on age.

Even more importantly, there is a strong need to review and redress discriminatory practices towards older adults. Older adults also need to be encouraged to play a much more active role in the development, interpretation, and application of the law. That means, among other things, taking an active part in the development of policies and laws that will have an impact on important parts of their lives, as well as acting as intervenors in key court cases so that the reality of older adults' lives and relationships can truly be understood and appreciated. Finally, as a society we need to transform our ideas about growing old. This is a process that has begun but needs to continue to evolve.

# APPENDIX A

# Methodology

As part of our examination of the law and older adults' personal relationships, we have relied on four methods (consultation, literature review, in-depth analysis, and case study). Together, the information helps to answer four key questions:

1. What are the major problems in regard to law and older adult relationships?

To answer that, we consulted by telephone eleven key people from across Canada who work with seniors' issues or specialize in issues related to law and ageing. The purpose of this targeted survey was to define the major issues related to law and older adults' personal relationships. The results of this consultation are identified in Chapter V.

2. What has been said on older adults' relationships and the law?

Here we conducted a review of selected literature on ageing in Canada, as well as critical analyses of the existing literature on the statutes and common laws potentially touching upon older adults relationships, law reform issues that directly or indirectly affect relationships, and psychosocial and value issues relating to the laws.

3. What are the values that can be extracted from legal material related to older adult relationships?

We conducted a review of seven areas of law and policy and their applications to extract the values underpinning the law and policy. That overview is provided in Chapter VI.

4. What can we learn from the legal practices regarding law and older adult relationships?

We examined several legal cases that were identified as touching upon important aspects of older adults' personal relationships by the key people we interviewed. We then selected three cases that offered ways to illustrate themes arising in the case law review and the consultation. In this process, we asked: "What specifically can we learn from the single case?" (Stake, 1994, p. 236).

This four-step approach (consultation, bibliographical study, in-depth analysis and case study) has certain similarities to "grounded theory" used in qualitative research (where a conceptual framework evolves during the research, where ideas are generated from the data, etc.). Our approach is more suited to examining legal, psychosocial and value issues concurrently. Also, our conceptual work does not emphasize theory development. However, it proposes ways of questioning the laws and their application in the field of older adults' relationships.

# APPENDIX B

## Are Older Adults More Vulnerable to Exploitation or Harm in their Relationships than Younger Adults?

There are a number of important considerations in looking at the relative "vulnerability" of older adults to undue influence, abuse, or other forms of behaviour in which others try to shape the relationship to meet their needs and not those of the older person. Let's consider what is presently known.

### 1. Advanced Age

Advanced age, in and of itself, does not create a special vulnerability to harm but there are many physical and mental health conditions that are much more likely to arise the older that one gets. Seniors aged 85 and over represent the fastest-growing segment of the senior population.[194] In 1998, there were close to 400,000 Canadians aged 85 and over, up from 140,000 in 1971 and only 21,000 in 1921. Approximately one in ten Canadian seniors is now 85 or over. This is up from one in twenty earlier this century.

### 2. Deteriorating Mental Capacity

In many cases involving undue influence or unconscionable bargains, the older adults are frequently noted as having declining mental capability or are suffering from Alzheimer's disease. Statistically speaking, 8% of all seniors develop the disease. The prevalence increases the older one gets. It affects 2.4% of people aged 65-74 years, and 34.5% of those aged 85 or over.[195] In the early stages of the disease, there can be minor memory lapses, erratic or impulsive behaviour (judgement can be impaired). The older adult is often able to hide the signs of the disease from others. In the later stages, the confusion and memory loss becomes more apparent.

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[194] Health Canada, Division of Aging and Seniors "Canada's Seniors, No. 2, Older Seniors Fastest Growing Group", Prepared by Statistics Canada for the Division of Aging and SeniorsOnline: <http://www.hc-sc.gc.ca/seniors-aines /pubs/factoids/en/no2.htm>

There are many other health conditions that can affect the older adult's mental ability, including infection, improper types or level of medication being received, depression, and the direct and indirect effects of cerebrovascular strokes.[196] Alcohol consumption may be an in issue in some cases, partly because older adults metabolize the alcohol in their bodies more slowly and its effects linger much longer. It takes far less alcohol for a senior's judgement to be affected.[197] However, it is important to recognize that even older adults who have deteriorating mental capacity will have times during which they are very lucid and are able to express their own wishes.

### 3. Deteriorating Physical Ability

An increasing number of older adults are living their late years in relatively good health, only exhibiting a marked deterioration in health in the last two years before death. However, some seniors will experience deteriorating physical ability. Injuries from falls can lead to broken hips that repair very slowly in older adults, paralysis from strokes can seriously affect an older adult's independence, and deteriorating visual impairment can heighten an older adult's reliance on others to meet the basic needs. These may include personal care, and taking care of matters such as banking. The presence of these physical disabilities often means a greater reliance on someone, and with that, greater opportunity for that other person to exploit the situation. At the same time, it is important to remember that only a minority of people who have the opportunity to take advantage of an older adult use it.

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[195] Canadian Study of Health and Aging Working Group. "CSHA-1 Core Paper #1 — Abstract, Canadian Study of Health and Aging: study methods and prevalence of dementia" (1994)150 Can Med Assoc J. 899-913. Online: <http://www.uottawa.ca/academic/med/epid/core1.htm>

[196] According to the Heart and Stroke Foundation, most stroke survivors have some memory problems. Strokes often lead to short "retention spans", how many pieces of information in a message can be remembered, and will perform well only if given brief, simple messages.

[197] Between 6 and 10% of seniors experience problems with their alcohol consumption. See C.C. Callaghan & W.T. Tierney "Health service use and morality among older primary care patients with alcoholism" (1995) 43 Journal of the American Geriatrics Society 1378-83. Also D. Bradshaw, and C. Spencer, *"The Role of Alcohol in Elder Abuse Cases" Elder Abuse Work: Best Practice in Britain and Canada,* J. Pritchard, ed., (London, Eng.: Kingsley Publishing, 1999).

### 4. Isolation

As time progresses, many of the people who have been important to an older adult may have moved away or died. Grown children have often moved from rural communities to urban centres, or from one province to another. Neighbourhoods and communities are often changing. Each of these increases the likelihood of some seniors feeling and becoming increasingly isolated. Eighteen per cent of men and fourteen per cent of women aged 65 and over state they have no friends.[198] Thirteen percent of older men and 16% of older women state they have one or two friends.[199]

Widowhood does not necessarily mean being isolated, but it can be a factor if the older adult has few relationships with people other than his or her spouse. Older women are very likely to become widowed. At age 65, 31.6% are widows, by age 75-84 this increases to 58%, and by 85, almost 80% of women are widowed. At the same time, only 12.7% of all older men experience widowhood (compared to 31.6% of all older women). Older women can expect to live at least 20-30 years on their own, upon becoming widowed.[200]

Many older adults live alone. In 1996, women aged 65 and over were more than twice as likely to live alone as men. For some, this is a preferred way of living.[201] For others, living alone may reflect a lack of personal relationships and it can set the stage for social isolation.

Researchers and practitioners who deal with abuse of older adults note that social isolation is common in many suspected abuse situations, particularly abuse by family members other than spouses and abuse by "new found friends". In some instances, the older adult is lonely before the perpetrator becomes involved. In many instances, the perpetrator actively fosters that isolation, by restricting the contact that the older adult has with other family members and friends.[202] In some instances, the older adult is importuned by the perpetrator to move to a different community, which in effect creates reduced contact with people who are important to the senior, as well as with people who can monitor the situation.

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[198] Statistics Canada. *Family and Friends,* Ottawa, 1994 (1990 General Social Survey; Cat. No. 11-612 at 107).

[199] *Ibid.*

[200] Canada's Seniors, No. 14, Marital Status, *supra* note 14.

[201] *V. Doyle, supra* note 11.

[202] See, for example, *Danchuk* v. *Calderwood*, [1996] B.C.J. No. 2383, a court case involving family disputing a will made by their father, aged 81. In the years before his death, Mr. Danchuk's memory was becoming increasingly impaired. His family hired a housekeeper to help care for him. Over time it became increasingly difficult for friends to contact him, as the housekeeper kept informing them that he was " ill", "sleeping" or "tired". Over several months, they eventually gave up trying to maintain contact with him. The housekeeper subsequently married Mr.Danchuk, which was surprising to the family as he was not divorced from his first

With this isolation, the perpetrator has the opportunity to "wear the person down", as they are now together day in and day out. For example, in *Hamel et Commission des droits de la personne et des droits de la jeunesse du Québec* v. *Fiset*,[203] a 78-year-old woman acknowledged having signed over several documents, including almost all of her cash assets over to her nephew, "to have peace ... not to oppose him ... to avoid being abandoned", and to prevent her from being obliged "to remain alone" without assistance from anyone. The situation is further complicated by the fact that the person "helping" ostensibly takes on the role of "advocate" for the older adult. In that role, there is a perceived legitimacy on the part of others that this person "speaks for" the older adult.

The perpetrator also often controls the flow of information to the older adult. The result is that the older adult becomes increasingly dependent on the perpetrator. The older adult may have the feeling that she or he does not have any options except to rely on this person. The older adult may not be aware that there might be options or, because the way the options are presented, they all seem unsuitable.

### 5. Caregiving

The person who takes on caregiving for an older adult is the one who is the geographically closest. Studies also indicate that the least socially integrated child (unmarried or mentally disabled), not necessarily the most capable, most often is given the responsibility for the care of an older person.[204]

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wife and may not have had the mental capacity to marry. Soon after, a new will in favour of the housekeeper was drawn up.

[203] Mme. Hamel sued her nephew for $20,500 that she had signed over to him in a cheque, ostensibly for renovations to her house which she had previously willed to him. Her total cash assets were $20,600 which she was "keeping for her old days", when she might need to go into a nursing home. In finding that the nephew has exploited the situation, the court paid particular attention to the fact that the nephew lived with his aunt. The court noted that these renovations to the house would have been to the nephew's benefit as heir, not the aunt. The court also noted her gradual loss of autonomy, her gradual neglect, increasing confusion, and the fact that she needed assistance after a fall at home. Her nephew did the banking for the aunt. Hamel et Commission des droits de la personne et des droits de la jeunesse du Québec c. Fiset, [1998] J.T.D.P.Q. no 47.

[204] M.J.Qunin & S.K.Tomita, *Elder Abuse and Neglect* (New York: Springer-Verlag, 1986). See also, T. Connidis, C.J. Rosenthal & J.A. Mcmullin, "Impact of family composition on providing help to older parents" (Dec. 1996) 18 (4) Research on Aging. 402-429.

### 6. Education and Literacy

According to the International Adult Literacy Survey (IALS), there are more than 1.6 million Canadians aged over 65 years who perform at the lowest literacy level. This means that they have significant difficulty manageing everyday reading, writing and arithmetic. This affects their ability to understand and use information. It also means that many seniors are restricted in daily activities and often dependent on others for help. This can leave them more reliant on personal relationships for help and more accepting that what they are being told is "the truth" on those financial and legal matters (e.g. signing legal documents).

It is also important to realize that 40% of Canadians over the age of 65 years have not completed primary school, compared with only 4% of Canadians aged 26 to 35 years. Over six out of ten older adults never completed high school. Of these, 25% had attended, but had not graduated from high school, while 37% had less than a Grade 9 education. At the other end of the scale, 13% of Canadians aged 56 to 65 years have attended university, compared to 28% for those aged 36 to 45.

### 7. Financial Circumstances

Financial abuse cases affect our sense of fairness. In many cases, it is the effect of the abuse or exploitation, more so than the vulnerability of the person that concerns us. Realistically, older adults have little or no real opportunity to recoup these losses, unlike a 45- year-old who still has potentially 20 or more years of employment ahead. The losses in financial abuse cases often represent much if not everything that the person has worked for over the years (house, retirement funds). The losses represent loss of independence and loss of choices.

### 8. Economic Vulnerability

Financial abuse can create poverty. In spite of the fact that overall there has been a significant improvement in the financial situation of most seniors, for many older women it is a transient situation that changes dramatically upon widowhood. Most older couples live above Statistic Canada's Low Income Cut-Off (LICO). Upon widowhood, the situation changes for many older women, particularly if their husbands' pension benefits cease and the women do not have their own sources of retirement income. The vast majority of today's older women worked at home most of their lives, not in the paid labour force.

Older "unattached" women (that is, women who are widowed, divorced, or who have always been single) have the second highest poverty rate in Canada

(43.4%),[205] preceded only by single women with children. Many older women are dependent on government transfers for their late life income. Government transfers can account for up to 65% of older women's late life income, compared to approximately 47% of men's.

### 9. Ageism

Stereotypes are created when perceived group characteristics displace individual characteristics in the minds of others. The term "ageism" refers to a

> *Systematic stereotyping and discrimination against people because they are old, just as racism and sexism accomplish this with skin colour and gender. Old people are categorized as senile, rigid in thought and manner, old fashioned in morality and skills... .*
>
> *Ageism allows the younger generation to see older people as different than themselves; thus they subtly cease to identify with their elders as human beings.*[206]

Seniors tend to be stereotyped as falling into two extremes. At one end of the continuum, they are often characterized as poor, frail, and extremely vulnerable to exploitation by others. At the other end of the continuum, they are portrayed as well off, "greedy geezers", or as people who are "using up" health care resources "that others deserve more," and "leaving little or nothing, at the expense of future generations."

Seniors tend to be shown in stereotypic roles in the media. One common portrayal, particularly in TV comedies, is that of the ageing, controlling mother or father and the frustrated "caregiving" son or daughter. Older adults are also frequently portrayed as declining in mental capability or suffering from Alzheimer's disease.

Some of these stereotypes can "set up" an older adult for exploitation from others in their personal relationships. It can become easy for some to rationalize treating a frail older adult like a child. There can be a false sense of entitlement to the senior's assets, by virtue of gender,[207] birth order, [208] or the belief that "they are owed it". In other cases, people feel that they are going to get it anyway when the older adult dies, so why not take it now.

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[205] National Council of Welfare, *Profile of Poverty* (Ottawa: The Council, 1996).

[206] R. Butler, "Dispelling ageism: the cross-cutting intervention" (May, 1989) no. 2 Annals of American Academy of Policy and Social Sciences at 138, 139.

[207] "I'm the only male, I deserve it," "I'm the only daughter, I deserve it."

[208] "I'm the eldest/ youngest, I deserve it."

### 10. Taking Chances

Service providers, family, and professionals may be "risk-aversive" when it comes to decision-making involving seniors. The zone of personal privacy that we like to maintain as adults tends to shrink with old age. Often people become overly concerned about seniors taking certain kinds of "risks" (e.g. living alone, travelling on their own, gambling, making new friends). Actions that few people would question for younger adults, tend to be perceived as "risks" when applied to seniors. Seniors also face the prospect of people presuming that their mental capabilities are deteriorating, simply because they make certain kinds of decisions that others don't agree with.[209]

### 11. Environmental Dependencies

Being able to do things for oneself is extremely important for many seniors. However, changes in physical mobility as one ages can make that more challenging. Far fewer seniors drive than younger adults do. While 92.4% of men and 80.6% of women aged 45-64 have a valid driver's licence, only 69.4% of men and 22.0% of women aged 75 and over do.

### 12. Emotional Dependency

It would be extremely foolhardy to ignore the fact that some older adults are in a dependent relationship and that sometimes that dependency can leave them vulnerable. There are several explanations offered for why abuse in later life occurs. One is that there is a "web of dependency" between the abuser and the person being victimized. In early research, the assumption was that the older adult was the dependent one, having to rely on others giving care. Subsequent research determined that, where there was dependency, it was often the other person who depended on the older adult, particularly for financial support and accommodation but also for emotional support.[210] In these dependent relationships, the older adult (often mother or father) is often very concerned about the other person, particularly if the person has mental health problems, substance abuse problems or chronic unemployment. In sociological terms, they are "enmeshed " or "co-dependent on" each other.

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[209] C. Spencer, *Seniors At Risk: A Conceptual Framework*, Report prepared for Canadian Association on Gerontology and the Division of Aging and Seniors (Ottawa: Health Canada, 1996).

[210] K. Pillemer, "Dangers of dependency: new findings on domestic violence against the elderly" (Dec. 1985) 33(2) Social Problems 146-158.

### 13. The Context of the Relationship

Relationships exist on a continuum from positive and mutually fulfilling relationships to abusive and destructive ones. Between the two extremes lies a non-fulfilling relationship. It typically does not involve violence but it can create a negative psychological environment involving, among other things, lack of respect for the other. In this environment, it becomes very difficult for the person to maximize his or her potential.

### 14. The Nature of the Relationship

One of the many complicating factors in many of these cases is "what exactly is the nature of the relationship". In some instances the person starts off as a housekeeper, a nurse, or a close companion. The person benefiting monetarily from the arrangement may argue that the relationship is something more -- perhaps that of a common law wife.[211] This is more likely to be argued if a gift or transaction with older man is involved, as opposed to an older woman. Where the courts do not see this as a spouse like relationship, they are often willing to award the person "something" for their effort in giving care to the older adult, on a *quantum meruit* basis, or as "set off".

### 15. Psychological Barriers for Older Adults

The older adult may not want to even consider using the justice system. She or he may fear the opposing party, particularly if there has been abuse. Or the older adult may fear that the person who has harmed her or him will go to jail. While every abuser is someone's son or daughter, for an older adult having one's child go to jail produces a significant stigma on the older adult in the eyes of his or her peers and the community. For older women, whose major role in life was raising their children, and for older men, who have lost their other roles, how one's children are seen by others reflects on them as ageing parents. In abusive relationships, the older adult often wants to be safe from harm, but often wants to maintain a relationship with the person who has caused the harm. The issue is how can the legal system respond to both those needs at the same time, not focussing on one or the other as it currently does.

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[211] See, for example, *Mikita* v. *Lick*, [1992] B.C.J. No. 935, (BCSC).

# References

ADAMS, W. E. & MORGAN, R. (1994) "Representing the client who is older in the law office and the court room." *Elder Law Journal*, 2, 1-37.

ANTONUCCI, T. & AKIYAMA, H. (1995) "Convoys of social relations: family and friendships within a lifespan context." In R. Bliezner & V. Bedford (eds.) *Handbook of Ageing and the Family* (Westport, Conn.: Greenwood Press), 332-355.

ARANSON, S., ROSENWEIG, E. & KOSKI, A. (1995) *The Legal Rights of the Elderly*. (New York: Practising Law Institute).

ARONSON, J. (March, 1990) "Women's perspectives on informal care of the elderly: public ideology and personal experience of giving and receiving care." *Ageing and Society*, 10 (Part 1), 61-84.

ARONSON, J. (Autumn, 1990) "Older women's experience of needing care: choice or compulsion?" *Canadian Journal on Ageing*, 9 (3), 234-247.

ASSOCIATION OF ADVOCATES FOR CARE REFORM. (1997) *Social Isolation of Seniors* in Care Facilities. (Vancouver, B.C.: Peanut Butter Publishing).

BEAUVOIR, Simone de. (1972) *The Coming of Age*. (translated by Patrick O'Brian) (New York: Putnam).

BLAIR, J. (1996-97) "Honour thy father and mother"- but for how long? Adult children's duty to care for and protect elderly parents." *Journal of Family Law*, 35, 765-82.

BLIEZNER, R. & V. BEDFORD (eds.) (1995) *Handbook of Ageing and the Family* (Westport, Conn.: Greenwood Press).

BLIESZNER, R. & ADAMS, R. G. (1998) "Problems with Friends in Old Age." *Journal of Ageing Studies*, 12 (3), 223-238.

BRADSHAW, D. & SPENCER, C. (1999) "The role of alcohol in elder abuse cases." In J. Pritchard (ed.) *Elder Abuse Work: Best Practice in Britain and Canada*. (London, Eng.: Kingsley Publishing).

BURKE, W.T. (Spring, 1998) "Avoiding pitfalls when counselling the elderly." *The Compleat Lawyer*, 13-19.

BUTLER, R. (May, 1989) "Dispelling ageism: the cross-cutting intervention." *Annals of American Academy of Policy and Social Sciences*, 135-145.

CALLAGHAN, C.C. & Tierney, W.T. (1995) "Health service use and morality among older primary care patients with alcoholism." *Journal of the American Geriatrics Society*, 43, 1378-83.

CANADIAN STUDY ON HEALTH AND AGEING WORK GROUP. (March 15, 1994) "Canadian Study on Health and Ageing: study methods and prevalence of dementia." *Canadian Medical Association Journal*, 150 (6), 899-913.

CANADIAN STUDY ON HEALTH AND AGEING WORK GROUP (1994) "Patterns of care for people with dementia in Canada." *Canadian Journal on Ageing*, 13, 470-487.

CARRIÈRE, Y. (August, 1999) "More than just a question of numbers. " *GRC News*, 17 (2), 2-3.

CHAPPELL, N.L. (Spring, 1991) "In-group differences among elders living with friends and family other than spouses." *Journal of Ageing Studies*, 5 (1), 66-76.

COHLER, B.J. & ALTERCOTT, K. (1995) "The family of the second half of life: connecting theories and findings." In R. Bliezner & V. Bedford (eds.) *Handbook of Ageing and the Family* (Westport, Conn.: Greenwood Press) 59-94.

CONNIDIS, I. A. (1988) *Family Ties and Ageing*. (Toronto: Butterworths).

CONNIDIS, I.A., DAVIES. L. (May, 1992) "Confidants and companions: choices in later life." *Journals of Gerontology*, 47 (3), S115-S122.

CONNIDIS, I., & MCMULLIN, J. (Winter, 1992) "Getting out of the house: the effect of childlessness on social participation and companionship in later life." *Canadian Journal on Ageing*, 11 (4), 370-386.

CONNIDIS, T., ROSENTHAL, C.J., MCMULLIN, J.A. (Dec. 1996) "Impact of family composition on providing help to older parents." *Research on Ageing*, 18 (4), 402-429.

CUMMING, E. & WILLIAM E. H. (1961) *Growing Old: The Process of Disengagement*. (New York: Ayer).

DALZIEL, W. (1994) "Dementia: No longer the silent enemy." *Canadian Medical Association Journal*, 154, 1104-1107.

DE VRIES, B. JACOBY, C., DAVIS, C. (Summer, 1996) "Ethnic differences in late life friendship." *Canadian Journal on Ageing*, 15 (2), 226-244.

DOYLE, V. (February, 1994) *It's My Turn Now: The Choice of Older Women to Live Alone*. (Vancouver: Gerontology Research Centre, Simon Fraser University).

DUCHARME, F. (1993) "Santé et satisfaction maritale, deux dimensions de la qualité de vie des conjoints âgés." *Le Gérontophile*, 15(4), 23-28.

ECKERT, D. (n.d.) "The Jehovah's Witness tradition: religious beliefs and health care". In *Contemporary Issues*. The Cleveland Clinic Foundation, Department of Bioethics. (Cleveland, Ohio: The Foundation).

FOOT, D. (1996) *Boom, Bust & Echo: How to Profit from the Coming Demographic Shift*. (Toronto: Macfarlane Walter & Ross).

FORER, L. (1991) *Unequal Protection: Women, Children and the Elderly in Court*. (New York: Norton).

FRIED, C. (1981) *Contract as Promise*. (Cambridge, Mass.: Harvard University Press)

FROLIK, L. (ed.) (1999) Ageing *and the Law*. (Philadelphia, Pa.: Temple University Press).

FROLIK, L. (1999) "What is elder law?" (The developing field of elder law: a historical perspective)." In L. Frolik (ed.) *Ageing and the Law*. (Philadelphia, Pa.: Temple University Press), 4.

FROLIK, L.A. (1990) "Elder abuse and guardians of elderly incompetents." *Journal of Elder Abuse and Neglect*, 2, (3/4), 31-56.

FROLIK, L.A. & BROWN, M. (1992) *Advising the Elderly or Disabled Client*. (Englewood Cliffs, N.J: Thomson Professional).

FROLIK, L.A. & KAPLAN, R. (1995) *Elder Law in a Nutshell*. (St. Paul, Minn.: West)

FROLIK, L.A. (1996) "The biological roots of the undue influence doctrine: what's love got to do with it?" *University of Pittsburgh Law Review*, 57, 841-883.

GIROUX, GUY (1991) "L'éthique et le droit : convergence ou divergence en democratie libérale?" *Cahiers de Recherche Éthique*, No. 16 : Vers de nouveaux rapports entre l'éthique et le droit. p. 11-28.

GORDON, R. & S. VERDON-JONES (1995) *Adult Guardianship in Canada*. (Vancouver, B.C.: Carswell).

GORDON, R.M. (1995) "Adult guardianship and adult protection legislation in Canada: recent reforms and future problems." *Canadian Journal on Ageing*, 14 (Supplement 2), 89-101.

GRAVEL, S., LITHWICK, M., & BEAULIEU, M. (1997) "Quand viellir ensemble fait mal; les mauvais traitements dans les couples aînés." *Criminologie*, 30(2), 67-85.

HANSSON, R. O. & CARPENTER, B. N. (1994) *Relationships in Old Age*. (New York: Guilford Press).

HAZAN, H. (1994) *Old Age: Constructions and Deconstructions*. (Cambridge, Eng.: Cambridge University Press).

HEALTH CANADA, DIVISION OF AGEING AND SENIORS. (1999)
- "Canada's Seniors, No. 7, Living with Extended Families."
- "Canada's Seniors, No. 14, Marital Status."

HENDRICKS, J. & ROSENTHAL, C.J. (eds.) (1993) *The Remainder of Their Days: Domestic Policy and Older Families in the United States and Canada*. (New York: Garland Publishing).

HINDE, R.A. (March, 1995) "A suggested structure for a science of relationships." *Personal Relationships*, 2(1), 1-15.

HIGH, D. (November, 1993) "Why are elderly people not using advance directives." *Journal of Ageing and Health*, 5 (4), 497-515.

HOFLAND, B. (1990) " Use of facts to resolve conflicts between beneficence and autonomy." In Kane, R. A. & Caplan, A. L. (eds.) *Everyday Ethics, Resolving Dilemmas in Nursing Home Life*. (New York: Springer Publishing Company), 37-45.

HUGHES, M. & PASK, D. (eds.) *National Themes in Family Law*. (Toronto: Carswell).

HUYCK, M. H. (1995) "Marriage and close relationships of the marital kind." In R. Bliezner & V. Bedford (eds.) *Handbook of Ageing and the Family*. (Westport, Conn.: Greenwood Press),181-201.

JEROME, D. (1994) "Family estrangement: parents and children who 'lose touch'." *Journal of Family Therapy*, 16 (3), 241-58.

JOHNSON, C. (1995) "Cultural diversity in the late-life family." In R. Bliezner & V. Bedford (eds.) *Handbook of Ageing and the Family*. (Westport, Conn.: Greenwood Press), 307-317.

KAHANA, E., HAHANA, B. & YOUNG, R. (1985) "Social factors in institutional living". In W.A. Peterson & J. Quadagno (eds.) *Social Bonds in Later Life*. (Newbury Park: Sage) 389-418.

KANE, R. A. & CAPLAN, A. L. (1990) *Everyday Ethics, Resolving Dilemmas in Nursing Home Life*. (New York: Springer Publishing Company).

KAPP, M.B. (1999) "Chapter 21: Who's the parent here? The family's impact on the autonomy of older persons." In L. Frolik (ed.) *Ageing and the Law*. (Philadelphia: Temple University Press), 272-275.

KIMSEY, L. (1981) "Abuse of the elderly: the hidden agenda. II Future research and remediation." *Journal of the American Geriatrics Society*, 29 (11), 503-507.

KLASSEN, T.R. & GILLIN, C.T. (Summer, 1999) "The heavy hand of the law: the Canadian Supreme Court and mandatory retirement." *Canadian Journal on Ageing*, 18 (2), 259-276.

KORZEC, R. (Spring, 1997) "A feminist view of American elder law." *University of Toledo Law Review*, 28, 547-561.

KOSBERG, J. I. & KAYE L.W. (eds.) (1997) *Elderly Men: Special Problems and Professional Challenges*. (New York: Springer).

KRUK, E. (1995) "Grandparent-grandchild contact loss: findings from a study of 'grandparents rights' members." *Canadian Journal on Ageing*, 14 (4), 737-754.

KRUSE, C. (1994) "Contracts to devise or gift property in exchange for lifetime homecare- latent and insidious abuse of older persons." *Probate Law Journal*, 12, 1-7.

MACRAE, H. (1996) "Strong and enduring ties: older women and their friends." *Canadian Journal on Ageing*, 15(3), 374-392.

MACRAE, H. (June, 1992) "Fictive kin as a component of the social networks of older people." *Research on Ageing*, 14 (2), 226-247.

MANCINI, J.A. (1980) "Friend interaction, competence and morale in old age." *Research on Ageing*, 2 (4), 416-431.

MANITOBA LAW REFORM COMMISSION (May, 1998) *Discussion Paper on Elder Abuse and Adult Protection*. (Winnipeg: The Commission).

MCDONALD, A. & TAYLOR, M.E. (1995) *The Law and the Elderly*. (London: Sweet & Maxwell).

MCMAHON, B. (26 juin, 1998) "Vols avec violence à l'endroit de personnes âgées: Le facteur de réhabilitation doit céder le pas à la dissuasion." *La presse juridique*, Vol. 6, No 10.

MCMULLIN, J.A. & MARSHALL, V. (1996) "Family, friends, stress and well-being: does childlessness make a difference." *Canadian Journal on Ageing*, 15 (3), 355-374.

MESLIN, E.M. & SUTHERLAND, K. ("1993) "Advance directive policy in Canada: the impact on older people and their families." In J. Hendricks & C. J. Rosenthal (eds.) *The Remainder of Their Days : Domestic Policy and Older Families in the United States and Canada*. (New York: Garland Publishing), 193-213.

MITCHELL, B. (Oct. 1998) "Cluttered Nest/Crowded House Myths and Realities." *GRC News*, Vol. 17 (3), 3-4.

MOLLOY, D.W., CLARNETTE, R.M., BRAUN, E.A. EISEMANN, M.R. & SNEIDERMAN, B. (1991) "Decisionmaking in the incompetent elderly: The 'daughter from California' syndrome." *Journal of the American Geriatrics Society*, 29, 396-399.

MORGAN, L. S. (1982) "Social Roles in Later Life: Some Recent Research Trends." In Eisdorfer, C. (ed.) *Annual Review of Gerontology and Geriatrics*, 3, 55-79.

MURTAUGH, C. M, KEMPER, P., & SPILLMAN, B. (October, 1990) "The risk of nursing home use in later life." *Medical Care*, 28 (10), 952-962.

NATHANSON, P. (1978) "Elder law." In Marjorie Smith, & Karen M. Imeson (eds.) *Law and the Elderly*. Proceedings of a Conference held April 6 to 8, 1978 at Sheraton Landmark Hotel, Vancouver, B.C. (Centre for Continuing Education, University of B.C.).

NATIONAL ADVISORY COUNCIL ON AGEING (1997)
- *Ageing Vignettes #1*, "A Quick Portrait of Canadian Seniors, How Many Seniors? Women Versus Men? How Old?"
- *Ageing Vignettes #4*, "A Quick Portrait of Canadian Seniors, "How Many Live With Their Family? Alone?"

NATIONAL COUNCIL ON WELFARE (Spring, 1998) *Poverty Profile*, 1996. (Ottawa, Ont.: The Council).

PENNING, M.J. (1998) "In the middle: parental caregiving in the context of other roles." *Journal of Gerontology*, 53, S188-197.

PESIAH, C., BRODATZ, H., LUSCOMBE, G., KRUK, G. & ANSTEY, K. (1999) "The Parent Adult- Child Relationship Questionnaire (PACQ): the assessment of the relationship of adult children to their parents." *Ageing and Mental Health*, 3 (1), 28-38.

PETERSON, C. & PETERSON, J.L. (1988) “Older men's and women's relationships with adult kin: how equitable are they?” *International Journal on Ageing and Human Development*, 27 (3), 221-231.

PILLEMER, K. & SUITOR, J. (August, 1991) “Will I ever escape my children's problems? Effects of adult children's problems on elderly parents.” *Journal of Marriage and the Family*, 53 (3), 585-594.

PILLEMER, K. (December, 1985) "Dangers of dependency: new findings on domestic violence against the elderly." *Social Problems*, 33 (2), 146-158.

POIRIER, D. (1997) *Au nom de la loi, je vous protège: la protection juridique des aînés au Nouveau Brunswick et au Canada* (Éditions d'Acadie).

POIRIER, D. (1992) "Powers of social workers in the creation and application of elder protection statutory norms in New Brunswick and Nova Scotia." *Journal of Elder Abuse and Neglect*, 4 (1/2), 113-133.

QUNIN, M.J. & TOMITA, S.K. (1986) *Elder Abuse and Neglect*. (New York: Springer-Verlag).

REAGAN, J. (1990) *The Aged Client and the Law*. (New York: Columbia University Press).

ROBERTS, P. & FAWCETT, G. (1998) *At Risk: A Socio-economic Analysis of Health and Literacy Among Seniors* (*International Adult Literacy Survey*). (Ottawa: Ministry Responsible for Statistics Canada) Catalogue No. 89-552-MPE, No. 5.

ROSENTHAL, C.J., MARTIN-MATTHEWS, A., & MATTHEWS, S.H. (1996) "Caught in the middle? Occupancy in multiple roles and help to parents in a national probability sample of Canadian older adults." *Journals of Gerontology*, 51B (6), S275-283.

ROSENTHAL, C. J. & GLADSTONE, J. (Spring, 1993) "Family relationships and support in later life" *Journal of Canadian Studies*, 28 (1), 122-137.

RUBIN, S. (1998) *When Doctors Say No: The Battleground of Medical Futility*. (Bloomington, Ind.: Indiana University Press).

SENATE OF CANADA, SPECIAL SENATE COMMITTEE, (1995) *Of Life and Death: Report on Euthanasia and Assisted Suicide*. (Ottawa: Queen's Printer).

SHANAS, E. & STREIB, G.F. (1965) *Social Structure and the Family, Generational Relations*. (Englewood Cliffs, N.J.: Prentice- Hall).

SINGLE, E. MACLENNAN, A. & MACNEIL, P. *Horizons 1994: Alcohol and Other Drug Use in Canada*. (Health Canada: Canada's Drug Strategy).

SMITH, L.F. (1988) "Representing the elderly client and addressing the issue of competence." *Journal of Contemporary Law*, 14, 61-104.

SMYER, M., SCHAIE, K.W., & KAPP, M. (eds.) (1996) *Older Adults' Decision-Making and the Law*. (New York: Springer).

SNELL, J.G. (1996) *The Citizen's Wage: The State and the Elderly in Canada, 1900-1951*. (Toronto: University of Toronto Press).

SNELL, J. G. (1990) "Filial responsibility laws in Canada: an historical study." *Canadian Journal on Ageing*, 9 (3), 268-277.

SPENCER, C. (1995) *Diminishing Returns: An Examination of Financial Decision Making, Financial Responsibilities and Financial Abuse Among Seniors*. (Vancouver, B.C.: Gerontology Research Centre).

SPENCER, C. (1995) *Seniors at Risk: A Conceptual Framework*. Prepared for Canadian Association on Gerontology & Health Canada, Ottawa.

SPENCER, C. (October, 1999*) Exploring the Social and Economic Costs of Abuse in Later Life*. Prepared for Health Canada, Family Violence Prevention Unit, Ottawa.

STAGNO, S. (n.d.) "Feminist ethics." The Cleveland Clinic Foundation, Department of Bioethics. (Cleveland, Ohio: The Foundation).

STATISTICS CANADA

- *The Daily*, November 19, 1998, "Health and Literacy Among Seniors".
- *The Daily*, July 29, 1997, "Age and Sex, 1996 Census".
- *The Daily*, October 14, 1997, "1996 Census: Marital Status, Common Law Unions, and Families".
- *The Daily*, November 18, 1993, Catalogue No. 11-001E.

STATISTICS CANADA. (1998*) Family Violence in Canada: A Statistical Profile*, 1998. (Ottawa) Catalogue No. 85-224-XIE.

STATISTICS CANADA. (1994) *Family and Friends* (Ottawa: 1990 General Social Survey), Catalogue No. 11-612.

STATISTICS CANADA (1993) *Ageing and Independence: Overview of a National Survey*. (Ottawa: Minister of Supply and Services) Catalogue No. H88-3/13-1993E.

STATISTICS CANADA, (1993) *Population Ageing and the Elderly*. (Ottawa: 1991 Census of Canada) Catalogue No. 91-533E.

STEEL, F. (1988) "Financial obligations toward the elderly: filial responsibility laws." In M. Hughes & D. Pask (eds.) *National Themes in Family Law*. (Toronto: Carswell).

STRAIN, L. & PAYNE, B. (Spring, 1992) "Social networks and patterns of social interaction among ever single and separated/divorced elderly Canadians." *Canadian Journal on Ageing*, 11 (1/2), 31-53.

SUITOR, J., PILLEMER, K. KEEYON S. & ROBISON, J. (1995) "Aged parents and ageing children: determinants of relationship quality." In R. Bliezner & V. Bedford (eds.) *Handbook of Ageing and the Family*. (Westport, Conn.: Greenwood Press), 223- 242.

TAUER, A. (1990) "Risks and choices: when is paternalism justified." In Kane, R. A. & Caplan, A. L. (eds.) *Everyday Ethics, Resolving Dilemmas in Nursing Home Life*. (New York: Springer), 45-52.

TINDALE, J.A., NORRIS, J.E., BERMAN, R., KUIACK, S. (1995) *Intergenerational Conflict and the Prevention of Abuse Against Older Persons*. (Ottawa: Health Canada, Family Violence Prevention Unit).

TOMITA, S.K. (1990) "The denial of elder mistreatment by victims and abusers: The application of neutralization theory." *Violence and Victims*, 5(3), 171-184.

TORNSTAM, L., (1995), "Solidarity between the generations - a Janus-faced appeal", *Ageing International*, XXII (3), 23-27.

TREMBLAY, P.R. "Counselling clients who weren't born yesterday: age and the attorney." *Family Advocate*,16, 24-27.

TROLL, L. (1995) "Foreword." In R. Bliezner & V. Bedford (eds.) *Handbook of Ageing and the Family*. (Westport, Conn.: Greenwood Press), xi-xix.

VILLEY, M. (1957) *Leçons d'histoire de la philosophie du droit*. (Paris: Dalloz).

WACKER, R. (1995) "Legal issues and family involvement in later life families." In R. Bliezner & V. Bedford (eds.) *Handbook of Ageing and the Family*. (Westport, Conn.: Greenwood Press), 284-306.

WATSON, S.D. (1999) "When parents die: A response to 'Before Guardianship: Abuse of Patient Rights Behind Closed Doors'." In L. Frolik (ed.) *Ageing and the Law*. (Philadelphia: Temple University Press), 280-8.

WEIJER, C. (1999) "Why I am not a futilitarian." *Canadian Medical Association Journal*, 160, 869-70.

WHITTON, L.S. (1999) "Ageism: paternalism and prejudice." In L. Frolik (ed.) *Ageing and the Law*. (1999) (Philadelphia: Temple University Press),19.